Dato' Seri Anwar bin Ibrahim v Public Prosecutor and Another Appeal

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEALS NO 05–6 OF 2003 (W) AND 05–7 OF 2003 (W)
ABDUL HAMID MOHAMAD, RAHMAH HUSSAIN FCJJ AND TENGKU BAHARUDIN SHAH JCA
2 SEPTEMBER 2004

Criminal Law — Carnal intercourse against order of nature — Ingredients of offence — Whether date of commission important to secure conviction — Penal Code s 337B

Evidence — Accomplice — Whether witness an accomplice

Evidence — Confession — Voluntariness — Whether confession by accused voluntarily made — Confession made before a magistrate — Effect of — Whether judge to consider further voluntariness of such confession — Whether facts surrounding making of confession considered

Evidence — Corroboration — Accomplice evidence — Whether evidence of accomplice required corroboration — Whether facts disclosed corroborative evidence — Evidence Act 1950 s 114(b), 133

Evidence — Impeachment — Credibility of witness — Contradiction with evidence given at previous trial — Whether contradictions explained — Whether mere fact of allowing impeachment proceedings automatically renders witness reliable or untruthful — Whether credit of witness affected

The appellants were charged with the offence of sodomy, punishable under s 377B of the Penal Code. The second appellant was also charged with abetting the first appellant the commission of the offence of sodomy. Both the appellants were tried jointly. They were convicted with the first appellant being sentenced to nine years which the second appellant was sentenced to six years and two strokes for each charge. They appealed. The issues for consideration were: (1) whether the trial had correctly, in law and on the facts, called for the defence; (2) if the learned trial judge had in fact correctly called for the defence, then whether the had correctly convicted the appellants at the close of the case of the defence, in that whether the prosecution had proved the case beyond reasonable doubt. The specific issues for consideration concerned: (1) the evaluation of the evidence of Azizan (the complainant) in respect of (a) the impeachment proceedings against him. There were two inconsistent statements made by the complainant — one in a previous trial and the other in this trial. The complainant's explanation with regard to the contradiction was accepted by the High Court and not disturbed by the Court of Appeal and (b) whether the complainant was an accomplice and if the answer to this was in the affirmative, whether the evidence of the complainant required corroboration (2) the voluntariness of the confession of the second appellant (a) on what the magistrate did or did not do in the recording of the confession; (b) the voluntariness of the confession itself, that is had the prosecution proved beyond reasonable doubt that the confession was made voluntarily; considering all the circumstances, were the allegations of the second appellant so improbable that it does not appear that the making of the confession was not voluntary, or that it did not raise any reasonable

doubt that the confession was not made voluntarily; has the prosecution established beyond a reasonable doubt that it was not obtained from him either by fear or prejudice or hope of advantage created by a person in authority or by oppression; were there no suspicious circumstances surrounding the making of the confession.

Held, allowing the appeal:

(1) (per **Abdul Hamid Mohamad FCJ**) The explanation by the complainant with regard to the contradiction between the two statements was not absolutely satisfactory but there is no inclination to disturb the findings of both the High Court and Court of Appeal based on, firstly, the court did not have the advantage of seeing and hearing the witness; secondly, in impeachment proceedings, the complainant was placed in the position of the accused and must therefore be given the benefit of doubt; and thirdly the harshness of the effect of impeachment, ie not only the evidence of the complainant would be disregarded, he would also be liable to prosecution for perjury (see paras 30, 31 and 32).

(2) (per **Abdul Hamid Mohamad FCJ**) The fact that he was not impeached does not mean that his whole evidence must be believed. His evidence would have to be scrutinised with care bearing in mind the dent in his credibility caused by his contradicting statements. In the end result, if any doubt is created, the benefit of that doubt must be given to the appellants because they are the accused persons (see para 35).

(3) (per **Abdul Hamid Mohamad FCJ**) The complainant was however uncertain about the date of the offence. He was not an outright liar but his credit was definitely not unaffected. Therefore, although the findings of the trial judge are not interfered with, the court is unable to agree with the trial judge and Court of Appeal that the complainant was a 'wholly reliable and credible and truthful witness' (see para 57).

(4) (per **Abdul Hamid Mohamad FCJ**) The complainant was neither a child nor an infirm. He had allowed himself to be sodomised up to 10 to 15 times over a number of years. He did nothing to resist. In fact, he cooperated in the act. Looking at the whole episode and by the complainant's own account, it appeared like a repetition of a familiar act in which the actor knew his part. He may have been reluctant but he was an accomplice nevertheless (see para 61).

(5) (per **Abdul Hamid Mohamad FCJ**) Although an accomplice is a competent witness, a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. However it has been a rule of practice for the judge to be warned of the danger of convicting on the uncorroborated testimony of an accomplice. It is a matter of prudence, except where circumstances make it safe to dispense with, that there must be corroborative evidence of an accomplice (*Yap Ee Kong & Anor v Public Prosecutor* [1981] 1 MLJ 144) (see para 184).

(6) (per **Abdul Hamid Mohamad FCJ**) On the facts, although the complainant's evidence was not unacceptable, some parts of his evidence were doubtful and inconsistent. There was therefore a need to look for corroborative evidence. The facts disclosed that there was in fact no

corroborative evidence and it was therefore unsafe to convict on his evidence alone since the offence was sexual in nature (see paras 195 and 199).

(7) (per **Abdul Hamid Mohamad FCJ**) An accused may, at any time of making the confession inform a magistrate that he is making the confession voluntary and the magistrate may believe him. However that does not mean that the trial court must automatically accept that the confession was voluntarily made and therefore admissible. Although the magistrate may be justified based on his examination and observation of the accused that the accused was making the confession voluntarily, the trial court after holding a trial within a trial and hearing other witnesses, may find otherwise (see para 66).

(8) (per **Abdul Hamid Mohamad FCJ**) On the facts, there is no question about the opinion of the magistrate that he was satisfied that the second appellant was making his confession voluntarily but it is whether the finding of the learned judge that the confession was voluntarily made after the trial within a trial is correct (see paras 67).

(9) (per **Abdul Hamid Mohamad FCJ**) The facts that must be considered are that the accused had confessed after 10 days of intensive interrogation and 12 days of detention (up to the time he made the statement to the magistrate). The trial judge appeared to have only considered specific allegations made the second appellant regarding the treatment given to him during his detention and interrogation, and also the denial by the police officers. The trial judge and Court of Appeal had failed to consider all the surrounding circumstances, many of which were unusual, before and after the confession was made. The surrounding circumstances after the making of the confession were relevant, not as to the state of mind of the accused but it reflects on police officers. There was, therefore, a misdirection (see paras 147).

(10) (per **Rahmah Hussain FCJ** dissenting) The fact that there are discrepancies in a witness's testimony does not automatically make the witness unreliable, rendering the whole evidence unacceptable (see para 219).

(11) (per **Rahmah Hussain FCJ** dissenting) There were no compelling reasons to interfere with the finding of the courts below. In a sexual offence, the essential ingredients are the sexual act and the identity of the offender. The date is not a vital ingredient of the charge. In addition, the trial judge had stated that the evidence of the complainant, ie that he was sodomised between the dates specified in the charge, was not successfully challenged (see paras 228 and 231).

(12) (per **Rahmah Hussain FCJ** dissenting) On the issue of whether the complainant was an accomplice, no evidence was adduced to prove that the complainant had planned or agreed to any plan for him to come to the apartment to be sodomised or to participate in such an activity. There was nothing to suggest that the complainant had concurred fully in the criminal designs of another for a certain time until getting alarmed or for some other cause, that they turned upon their former associates and gave information against them. The complainant gave

his reasons why he was at the apartment and it was unchallenged by the defence. The assertion that he remained in a specific position even after the first appellant had sodomised him thereby enabling the second appellant to sodomise him should not be taken as a piece of evidence that would make him an accomplice of the first order. To brand the complainant as an accomplice without considering reasons would tantamount to castigating a rape victim for being in the wrong place at the wrong time. Such a draconian view would amount to a grave injustice to an innocent victim of sexual assault (see paras 236).

(13) (per **Rahmah Hussain FCJ** dissenting) Even if the trial judge was wrong in not finding the complainant as an accomplice, he did not however close his mind to the issues of corroboration of the need to warn himself of the danger of convicting a person on uncorroborated evidence, particularly in cases involving sexual offences (see para 239).

(14) (per **Rahmah Hussain FCJ** dissenting) In the alternative probability that the complainant was in fact an accomplice, there was corroborative evidence in the form of (i) the conduct of the first appellant in asking the complainant to retract the latter's statutory declaration and subsequently asking the prosecution's ninth witness, SAC1 Musa to cease investigation in relation to the police report; and (ii) the confession of the second appellant (see paras 243 and 244).

(15) (per **Rahmah Hussain FCJ** dissenting) In relation to the confession of the second appellant, the trial judge had considered each and every allegation raised, and the denial by the police officers. The details in the confession proved that it must have been given voluntarily. There was no reason to reject the reasoning of the trial judge (see paras 251).

[Bahasa Malaysia summary

Perayu-perayu dituduh dengan kesalahan meliwat, yang boleh dihukum di bawah s 377B Kanun Keseksaan. Perayu kedua juga dituduh bersubahat dengan perayu pertama melakukan kesalahan meliwat. Kedua-dua perayu dibicarakan bersama. Mereka disabitkan di mana perayu pertama dihukum penjara selama sembilan tahun dan perayu kedua dihukum penjara selama enam tahun dan dua kali sebatan untuk setiap pertuduhan. Mereka merayu. Isu-isu untuk dipertimbangkan adalah: (1) sama ada perbicaraan itu telah dengan betul di sisi undang-undang dan pada fakta, memanggil pembelaan; (2) jika hakim yang arif telah memanggil pembelaan dengan betul, sama ada beliau telah mensabitkan perayu-perayu dengan betul pada akhir kes pembelaan, iaitu sama ada pihak pendakwaan telah membukti kes itu melampaui keraguan munasabah. Isu-isu khusus untuk dipertimbangkan adalah berkenaan: (1) penilaian keterangan Azizan ('pengadu') berkaitan (a) prosiding pencabaran terhadap beliau. Terdapat dua penyataan yang tidak konsisten yang dibuat oleh pengadu — satu di dalam perbicaraan yang terdahulu, satu di dalam perbicaraan ini. Penerangan pengadu mengenai percanggahan ini telah diterima oleh Mahkamah Tinggi dan tidak dikacau oleh Mahkamah Rayuan; dan (b) sama ada pengadu adalah seorang rakan sejenayah, dan jika jawapan kepada soalan ini adalah mengiakan, sama ada keterangan pengadu memerlukan sokongan; (2) kesukarelaan pengakuan

perayu kedua (a) mengenai apa yang dilakukan atau tidak dilakukan oleh majistret semasa merekodkan pengakuan itu; (b) kesukarelaan pengakuan itu sendiri, iaitu sama ada pihak pendakwaan telah membuktikan melampaui keraguan munasabah bahawa pengakuan itu dibuat secara sukarela; melihat semua keadaan, sama ada pengataan perayu kedua terlalu tidak munasabah yang menyebabkan ia tidak kelihatan seperti pengakuan itu dibuat dengan tidak sukarela, atau ia tidak membangkitkan sebarang keraguan munasabah bahawa pengakuan itu tidak dibuat dengan sukarela; sama ada pihak pendakwaan membuktikan melampaui keraguan munasabah bahawa ia tidak diperoleh daripada beliau melalui ketakutan atau prejudis atau harapan suatu kelebihan yang direka oleh seorang yang berkuasa atau melalui penindasan; di mana tiada keadaan syak menyelubungi pembuatan pengakuan tersebut.

Diputuskan, membenarkan rayuan tersebut:

(1) (oleh **Abdul Hamid Mohamad HMP**) Penerangan yang diberi oleh pengadu berkait dengan percanggahan di antara dua penyataan itu tidak benar-benar memuaskan tetapi tiada kecenderungan untuk menganggu keputusan Mahkamah Tinggi dan Mahkamah Rayuan berdasarkan alasan-alasan, pertamanya mahkamah tidak mempunyai kelebihan untuk melihat dan mendengar saksi-saksi; keduanya, di dalam prosiding pencabaran, pengadu diletakkan di dalam keadaan tertuduh dan mesti diberi manfaat kesangsian; dan ketiganya, kekerasan kesan pencabaran, iaitu bukan hanya keterangan pengadu tidak dihiraukan, malah dia juga boleh didakwa untuk sumpah bohong (lihat perenggan 30, 31 dan 32).

(2) (oleh **Abdul Hamid Mohamad HMP**) Fakta bahawa beliau tidak dicabar tidak bermakna bahawa keseluruhan keterengan beliau mesti dipercayai. Keterangan beliau mesti diteliti dengan berhati-hati memandangkan bahawa terdapat keraguan pada kebolehpercayaan beliau yang disebabkan oleh percanggahan penyataan beliau. Pada akhirnya, jika terdapat keraguan, faedah kesangsian itu mesti diberikan kepada perayu-perayu kerana mereka adalah orang-orang tertuduh (lihat perenggan 35).

(3) (oleh **Abdul Hamid Mohamad HMP**) Pengadu tidak pasti tarikh kesalahan itu. Beliau bukan seorang pembohong tetapi kebolehpercayaan beliau bukannya tidak terjejas. Maka, walaupun keputusan hakim bicara tidak diganggu, mahkamah ini tidak dapat bersetuju dengan keputusan hakim bicara dan Mahkamah Rayuan bahawa pengadu adalah seorang yang meyakinkan dan boleh dipercayai, dan jujur (lihat perenggan 57).

(4) (oleh **Abdul Hamid Mohamad HMP**) Pengadu bukanlah seorang kanak-kanak atau cacat. Beliau telah membenarkan dirinya diliwat sebanyak 10 hingga 15 kali selama beberapa tahun. Beliau tidak berbuat apa-apa untuk menentangnya. Beliau berkerjasama di dalam perbuatan tersebut. Memandangkan keseluruhan episod ini dan melalui kata-kata beliau ia seakan-akan pengulangan perbuatan yang biasa dilakukan dimana seorang pelakon maklum akan peranannya. Beliau mungkin keberatan berbuat begitu tetapi dia walau bagaimanapun adalah seorang rakan sejenayah (lihat perenggan 61).

(5) (oleh **Abdul Hamid Mohamad HMP**) Walaupun seorang rakan sejenayah adalah saksi yang kompetan, satu sabitan tidak melanggar undang-undang hanya sebab ia berasaskan testimoni seorang rakan sejenayah yang tidak disokong. Akan tetapi, ia telah menjadi satu peraturan amalan untuk seorang hakim diberi amaran mensabitkan seorang di atas testimoni rakan sejenayah yang tidak disokong. Ia adalah hemat, kecuali jika keadaan membolehkan ia selamat untuk menghiraukannya, bahawa keterangan sokongan seorang rakan sejenayah perlu wujud (*Yap Ee Kong & Anor v Public Prosecutor* [1981] 1 MLJ 144 (lihat perenggan 184).

(6) (oleh **Abdul Hamid Mohamad HMP**) Atas fakta-fakta, walaupun keterangan pengadu bukannya tidak boleh diterima, beberapa bahagian keterangan beliau meragukan dan tidak konsisten. Maka, terdapat keperluan untuk mendapatkan keterangan sokongan. Fakta-fakta mendedahkan bahawa tiada keterangan sokongan dan oleh itu tidak selamat untuk mensabitkan atas keterangannya memandangkan bahawa kesalahan itu berunsur seksual (lihat perenggan 198 dan 199).

(7) (oleh **Abdul Hamid Mohamad HMP**) Seorang tertuduh boleh, pada bila-bila masa membuat pengakuan memberitahu majistret bahawa beliau membuat pengakuan itu secara sukarela dan majistret itu boleh mempercayai beliau. Akan tetapi ini tidak bermakna bahawa Mahkamah Tinggi patut menerima secara automatik bahawa pengakuan itu dibuat secara sukarela dan oleh itu boleh diterima. Walaupun seorang majistret mungkin mempunyai justifikasi berdasarkan pemeriksaan beliau dan penelitian tertuduh tersebut bahawa tertuduh telah membuat pengakuan secara sukarela, mahkamah bicara boleh, setelah mengadakan satu perbicaraan di dalam perbicaraan dan mendengar saksi lain, membuat keputusan sebaliknya (lihat perenggan 66).

(8) (oleh **Abdul Hamid Mohamad HMP**) Pada fakta-fakta, tidak terdapat persoalan berkaitan pendapat majistret bahawa beliau berpuas hati bahawa perayu kedua membuat pengakuan beliau dengan sukarela tetapi ia adalah sama ada keputusan hakim bicara bahawa pengakuan itu dibuat secara sukarela setelah perbicaraan dalam perbicaraan adalah betul (lihat perenggan 67).

(9) (oleh **Abdul Hamid Mohamad HMP**) Fakta-fakta yang mesti dipertimbangkan adalah tertuduh telah mengaku selepas 10 hari soal siasatan yang intensif dan 12 hari tahanan (sehingga masa beliau membuat penyataan itu kepada majistret). Hakim bicara seolah-olah hanya mempertimbangkan pengataan khusus oleh perayu kedua berkait dengan perlakuan yang diberi kepada beliau semasa tahanannya dan soal siasatan dan penafian oleh pegawai polis. Hakim bicara dan Mahkamah Rayuan gagal mempertimbangkan semua keadaan yang menyelubungi, kebanyakan daripadanya luar biasa sebelum dan selepas pengakuan itu dibuat. Keadaan yang menyelubungi selepas membuat pengakuan itu adalah relevan, bukan kepada keadaan fikiran tetapi ia mencerminkan pihak polis. Oleh itu terdapat salah arahan (lihat perenggan 147).

(10) (oleh **Rahmah Hussain HMP** menentang) Fakta bahawa terdapat percanggahan dalam keterangan seseorang saksi tidak secara automatik menjadikan saksi tersebut tidak boleh dipercayai, menyebabkan keseluruhan keterangannya tidak diterima (lihat perenggan 219).

(11) (oleh **Rahmah Hussain HMP** menentang) Tidak terdapat sebab-sebab memaksa untuk mengganggu keputusan mahkamah sebelum ini. Dalam sesuatu kesalahan seksual, intipati yang penting adalah perbuatan seksual tersebut dan identiti pesalah. Tarikh bukanlah suatu unsur penting pertuduhan tersebut. Tambahan pula, hakim bicara telah menyatakan bahawa keterangan pengadu, iaitu yang dia telah diliwat di antara tarikh-tarikh yang dinyatakan dalam pertuduhan, tidak berjaya dipertikaikan (lihat perenggan 228 dan 230).

(12) (oleh **Rahmah Hussain HMP** menentang) Berkenaan dengan isu sama ada pengadu merupakan rakan sejenayah, tiada keterangan diajukan untuk membukti bahawa pengadu telah merancang atau setuju kepada cadangan untuk pergi ke apartmen untuk diliwat atau unutk menyertai dalam aktiviti sedemikian. Tidak terdapat apa-apa untuk mencadangkan bahawa pengadu telah bersetuju sepenuhnya dengan niat jenayah seorang lagi untuk seketika waktu sehingga menjadi cemas atau atas alasan lain, mereka telah berpaling tadah terhadap bekas rakannya dan memberi informasi terhadap mereka. Pengadu telah memberi alasan-alasan kenapa dia berada di apartmen tersebut dan ia tidak dipertikaikan oleh pihak pembela. Kenyataan bahawa dia berada dalam kedudukan sedemikian walaupun selepas perayu pertama meliwatnya dan dengan itu membenarkan perayu kedua untuk meliwatnya, tidak harus dianggap sebagai bukti bahawa ia akan menjadikannya sebagai rakan sejenayah utama. Untuk mengecap pengadu sebagai rakan sejenayah tanpa mengambilkira alasan-alasan adalah sama seperti mengecam seorang mangsa rogol kerana berada di tempat yang salah pada masa yang silap. Pandangan yang sebegitu kuno akan membawa kepada ketidakadilan yang serius terhadap seorang mangsa serangan seksual yang tidak bersalah (lihat perenggan 236).

(13) (oleh **Rahmah Hussain HMP** menentang) Jikapun hakim bicara khilaf dalam keputusannya dengan tidak memutuskan bahawa pengadu sebagai rakan sejenayah, dia tidak menutup fikirannya kepada isu-isu sokongan yang memerlukan dia untuk memberi peringatan kepada diri-sendirinya atas bahaya menghukum seseorang tanpa keterangan sokongan, lebih-lebih lagi dalam kes melibatkan kesalahan seksual (lihat perenggan 239).

(14) (oleh **Rahmah Hussain HMP** menentang) Dalam kebarangkalian alternatif bahawa pengadu sememangnya rakan sejenayah, terdapat bukti sokongan dalam bentuk (i) kelakuan perayu pertama dalam menyuruh pengadu menarikbalik akuan berkanunnya dan seterusnya meminta saksi ke-sembilan pihak pendakwa, SAC1 Musa, untuk memberhentikan penyiasatan berkenaan laporan polis tersebut; dan (ii) pengakuan perayu kedua (lihat perenggan 243 dan 244).

(15) (oleh **Rahmah Hussain HMP** menentang) Berkaitan dengan pengakuan perayu kedua, hakim bicara telah mengambilkira setiap pengataan

yang diutarakan, dan penafian oleh pegawai-pegawai polis. Butir-butir pengakuan membuktikan bahawa ia telah diberikan dengan suka-rela. Tidak terdapat apa-apa sebab untuk menolak keputusan hakim bicara (lihat perenggan 251).

Notes

For cases on s 377 of the Penal Code, see 4 *Mallal's Digest*, (4th Ed, 2003 Reissue) para 1614.

For cases on whether witness an accomplice, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 77–82.

For cases on voluntariness of confession, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 746–785.

For cases on corroboration of accomplice evidence, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 809–833.

For carnal intercourse against the order of nature see 11 *Halsbury's Laws of Malaysia*, para [190.383].

For accomplices see 12 *Halsbury's Laws of Malaysia*, para [210.158].

For voluntariness of confessions see 12 *Halsbury's Laws of Malaysia* para [210.105].

For corroboration of accomplices see 12 *Halsbury's Laws of Malaysia* paras [210.158].

Cases referred to

Ah Mee v Public Prosecutor [1967] 1 MLJ 220 (refd)
Attorney-General of Hong Kong v Wong Muk Ping [1987] AC 501 (refd)
Balasingham v PP [1959] MLJ 193 (refd)
Bal Mukundo Singh v Emperor (1937) 38 Cr LJ 70 (Cal) (refd)
Bhojraj v Sitaram AIR 1936 PC 60 (refd)
Chan Ming Cheng v Public Prosecutor [2002] 3 MLJ 733 (refd)
Chean Siong Guat v PP [1969] 2 MLJ 63 (refd)
Chin Nam Hong v PP [1965] MLJ 40 (refd)
Clarke v Edinburgh and District Tramways Co Ltd (1919) SC 35 (refd)
Dato' Mokhtar Hashim v Public Prosecutor [1983] 2 MLJ 232 (refd)
Dato' Seri Anwar bin Ibrahim v Public Prosecutor [2000] 2 MLJ 486 (refd)
Dato' Seri Anwar bin Ibrahim v Public Prosecutor [2002] 3 MLJ 193 (refd)
Dato' Seri Anwar bin Ibrahim v Public Prosecutor [2004] 1 MLJ 177 (overd)
Director of Public Prosecutions v Hester [1973] AC 296 (refd)
Director of Public Prosecutions v Kilbourne [1973] 1 All ER 440 (refd)
Director of Public Prosecutions v Ping Ling [1975] 3 All ER 175, [1976] AC 574 (refd)
Dowse v Attorney-General, Federation of Malaya [1961] 27 MLJ 249 (refd)
Ganpart v Emperor AIR 1918 Lab 322 (refd)
Goh Leng Kwang v Teng Swee Lin & Ors [1994] 2 MLJ 5 (refd)
Hasibullah bin Mohd Ghazali v Public Prosecutor [1993] 3 MLJ 321 (refd)
Herchun Singh & Ors v Public Prosecutor [1969] 2 MLJ 209 (refd)
Ho Ming Siang v Public Prosecutor [1966] 1 MLJ 252 (refd)
Hussin bin Sillit v PP [1988] 2 MLJ 232 (refd)
Jegathesan v Public Prosecutor [1980] 1 MLJ 165 (refd)
Kandasamy v Mohamed Mustafa [1983] 2 MLJ 85 (refd)
Koay Chooi v Regina [1955] MLJ 209 (refd)
Ku Lip See v Public Prosecutor [1982] 1 MLJ 194 (refd)

Lai Kim Hon & Ors v Public Prosecutor [1981] 1 MLJ 84 (refd)
Law Kiat Lang v Public Prosecutor [1966] 1 MLJ 215 (refd)
Madam Guru & Another v Emperor (1923) 24 Cr LJ 723 (refd)
Matthew Lim v Game Warden, Pahang [1960] MLJ 89 (refd)
Mohd Ali bin Burut & Ors v PP [1995] 2 AC 579 (refd)
Ng Kok Lian & Anor v PP [1983] 2 MLJ 379 (refd)
Pie bin Chin v PP [1985] 1 MLJ 234 (refd)
Powell and Wife v Streatham Manor Nursing Home [1935] AC 243 (refd)
Public Prosecutor v Dato' Seri Anwar bin Ibrahim & Anor [2001] 3 MLJ 193 (overd)
Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1 (refd)
Public Prosecutor v Law Say Seck & Ors [1971] 1 MLJ 199 (refd)
Public Prosecutor v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
Public Prosecutor v Mohamed Ali [1962] MLJ 257 (refd)
Public Prosecutor v Mohammed Faizal Shah [1998] 1 SLR 333 (refd)
Public Prosecutor v Mohd Ali bin Abang & Ors [1994] 2 MLJ 12 (refd)
Public Prosecutor v Munusamy [1980] 2 MLJ 133 (refd)
Public Prosecutor v Somwang Phattanasaeng [1992] 1 SLR 138 (refd)
R v Brophy [1981] 2 All ER 705 (refd)
R v Richard Beynon [1999] EWCA Crim 1172 (refd)
R v Severo Dossi (1918) 13 Cr App R 158 (refd)
Sattar Buxoo & another v The Queen [1988] 1 WLR 820 (refd)
Sharom bin Ahmad v Public Prosecutor [2000] 3 SLR 565 (refd)
Sia Soon Suan v Public Prosecutor [1966] 1 MLJ 116 (refd)
Sri Kelangkota–Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors [2003] 3 MLJ 257 (refd)
Tan Ewe Huat v Public Prosecutor [2002] 1 MLJ 145 (refd)
Teoh Hoe Chye v Public Prosecutor [1987] 1 MLJ 220 (refd)
Wong Kam-Ming v R [1979] 1 All ER 939 (refd)
Yap Ee Kong & Anor v Public Prosecutor [1981] 1 MLJ 144 (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 50(3), 87, 87(3)
Criminal Procedure Code s 153(1)
Dangerous Drugs Act 1952 ss 37A, 37A(1)(a)
Evidence Act 1950 ss 24, 114(b), 133
Penal Code ss 377B, 377D

Christopher Fernando (Karpal Singh, Gurbachan Singh, Pawancheek Marican, Zainur Zakaria, Kamar Ainiah, SN Nair, Zulkifli Noordin, Marisa Regina and Saiful Izham Ramli with him) (Karpal Singh & Co, Raja Aziz Addruse, Aris Rizal Christopher Fernando & Co, Bachan & Kartar, Merican Hamzah & Shaik, Hj Sulaiman Abdullah, SN Nair & Partners, Zulkifli Noordin & Assoc) for the first appellant.

Jagdeep Singh Deo (Gobind Singh Deo, Ramkarpal Singh Deo and Shamsul Iskandar Mohd Amin (Karpal Singh & Co) for the second appellant.

Tan Sri Abdul Gani Patail, Attorney-General (Dato' Mohd Yusof bin Zainal Abiden, Dato' Azahar bin Mohamed, Tun Abdul Majid bin Tun Hamzah, Mohamad Hanafiah bin Zakaria, Shamsul bin Sulaiman, Ishak bin Mohd Yusof, Md Azar Irwan bin Mohd Arifin and Ahmad Fairuz bin Zainol Abidin (Attorney-General's Chambers) for the Public Prosecutor.

Abdul Hamid Mohamad FCJ (delivering the majority judgment):

[1] In this judgment, Dato' Seri Anwar bin Ibrahim will be referred to as 'the first appellant' and Sukma Darmawan Sasmitaat Madja will be referred to as 'the second appellant'.

[2] The first appellant was charged with an offence punishable under s 377B of the Penal Code.

[3] The second appellant was charged with two offences. The first charge is for abetting the first appellant in the commission of the offence with which the first appellant was charged. The second charge is similar to the charge against the first appellant ie under s 377B of the Penal Code.

[4] Both the appellants were tried jointly. The first appellant was convicted and sentenced to nine years imprisonment commencing from the expiry of the sentence he was then serving in the first trial. High Court Kuala Lumpur Criminal Trial No 45–48–1998 [1999] 2 MLJ 1 (HC), [2002] 2 MLJ 486 (CA) and [2002] 3 MLJ 193). The second appellant was convicted on both charges and sentenced to six years imprisonment and two strokes for each charge with the sentences of imprisonment to run concurrently. For the judgment of the High Court cited in the present case, see [2001] 3 MLJ 193.

[5] They appealed to the Court of Appeal. Their appeals were dismissed — see [2004] 1 MLJ 177.

[6] They appealed to this court and this is the majority judgment of this court.

[7] Section 87(3) of the Courts of Judicature Act 1964 ('CJA 1964') provides that a criminal appeal to this court 'may lie on a question of fact or a question of law or on a question of mixed fact and law.' The position is the same as in the case of the Court of Appeal hearing an appeal from a trial in the High Court as in this case — see s 50(3) CJA 1964.

[8] In this judgment, we shall first consider whether the trial judge had correctly, in law and on the facts, called for the defence. If he had not, it would not be necessary for us to consider the defence: the appellants are entitled to an acquittal. Only, if we find that the learned trial judge had correctly called for the defence that we will have to consider whether he had correctly convicted the appellants at the close of the case for the defence.

[9] In so doing, this court (and the trial court too), as a court of law, is only concerned with the narrow legal issue i.e. whether, at the end of the prosecution's case, the prosecution had proved beyond reasonable doubt that, in respect of both appellants, the appellants had sodomised Azizan bin Abu Bakar ('Azizan') at Tivoli Villa one night between the month of January until March 1993 and, in respect of the second appellant only, whether he had abetted the offence committed by the first appellant.

[10] In considering whether the defence was correctly called, this court, being an appellate court not only will consider whether all the ingredients of the offences have been proved beyond reasonable doubt, but will also consider whether there have been misdirections or non-directions amounting to misdirections that have caused a substantive miscarriage of justice.

[11] It must be borne in mind that the duty on the part of the prosecution at the close of the case for the prosecution is to prove beyond reasonable doubt, not only, that the offence was committed one night at Tivoli Villa, but also that that 'one night' was in the month of January until and including the month of March 1993. Even if it is proved that the incident did happen but if it is not proved 'when', in law, that is not sufficient. This is because the period during which the offence is alleged to have been committed is an essential part of the charge. It becomes even more important when the defence, as in this case, is that of alibi. The appellants must know when (usually it means the day or date, but in this case the period from and including the month of January until and including the month of March 1993) they are alleged to have committed the offence to enable them to put up the defence of alibi.

[12] In this respect we propose to take the bull by the horns. We shall consider, first, whether the prosecution had proved beyond reasonable doubt not only that the offence was committed, but whether it was committed one night during the three months' period. That would call for the evaluation of Azizan's evidence, and determining whether the second appellant's confession is admissible. There will be sub-issues that will have to be determined, eg the impeachment proceeding against Azizan, whether Azizan is an accomplice and the issue of voluntariness of the second appellant's confession. After deciding on those issues, we shall consider whether, in view of our findings on them, the decision of the learned trial judge to call for defence can stand. If it cannot stand, the matter ends there. If it can still stand, then only we shall consider the other issues raised at the close of the case for the prosecution. Only if after considering all the issues raised in respect of the case for the prosecution we are satisfied that the learned trial judge had correctly called for the defence that we shall consider the defence. Otherwise we do not have to as the appellants would also be entitled to an acquittal at the close of the case for the prosecution.

CREDIBILITY OF AZIZAN: GENERAL OBSERVATION

[13] For reasons best known to the defence which is also not difficult for us to understand, learned counsel for the appellants, especially Mr Christopher Fernando, kept stressing that Azizan was an outright liar. Actually, in doing so, he had placed a very high burden on the appellants. For the purpose of the case, in a criminal trial, it is not necessary for the defence to show or for the court to arrive at a conclusion that Azizan is a liar before his evidence may be regarded as unreliable. Azizan may not be a liar but his evidence may or may not be reliable. Further, some parts on his evidence may be reliable and some may not be.

[14] Before considering Azizan's credibility as a witness, one point must be made so that whatever conclusion we arrive at will not be an issue *vis-a-vis* the earlier finding of the High Court in the first trial which had been confirmed by the Court of Appeal and this court.

[15] It is to be noted that Azizan's credibility had been considered in the earlier case. All the three courts, including this court, had found that he was a credible witness.

[16] We must point out that that is a separate matter. His credibility as found by the courts in that case was in respect of that case, based on the evidence he gave in that case. In that case the main issue was whether the first appellant directed Dato' Mohd Said bin Awang, Director of the Special Branch and Amir Junus, Deputy Director II of the Special Branch to obtain a written statement from Azizan denying and withdrawing his (Azizan's) allegation of sodomy against the first appellant as contained in his (Azizan's) statutory declaration dated 5 August 1997 (Exh P14C in the first trial and Exh P5 in this trial which will be referred to as Exh P14C/P5) which they (Mohd Said and Amir Junus) obtained in the form of a written statement dated 18 August 1997 (Exh P17 in the first trial). That was the substance of the offence in the first trial. The substance of the main offence in the instant appeal is whether the appellants sodomised Azizan at Tivoli Villa one night in January until and including March 1993.

[17] Secondly, is it true that Azizan's statutory declaration dated 5 August 1997 (Exh P14C/P5) and Azizan's statement dated 18 August 1997 (Exh P17 in the earlier trial) featured strongly in this trial and appeal. But, as pointed out by this court, in the judgment of Haidar FCJ (as he then was) in the earlier appeal at p 213:

> In respect of (1) (ie allegation of sodomy by the first appellant in Exh P14C/P5 — added), after the evaluation of the evidence, the learned judge ruled there is evidence to show that Ummi and Azizan had made the allegations. In fact, in our view, the defence did not seriously dispute that the allegations were made but contended that they were false and fabricated. However, in view of the amendment to the charges, the truth or falsity of the allegation was no longer in issue. There are no reasons for us to disagree with the learned judge when he said at p 114 that:
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> '… there is evidence to show that Ummi and Azizan had made the allegations against the accused.'

[18] The principles adopted by the appellate courts not only in this country but also in other common law jurisdictions have been reproduced at length by the Court of Appeal — see from pp 206 to 208 of [2004] 1 MLJ. The Court of Appeal reproduced the *dicta* made in the following cases: *Clarke v Edinburgh and District Tramways Co Ltd* (1919) SC 35 at p 36 (per Lord Shaw of Dunfermline), *Powell and Wife v Streatham Manor Nursing Home* (1935) AC 243 at p 249 (per Viscount Sankey LC), *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209 at p 211 (per HT Ong CJ (Malaya)), *Lai Kim Hon & Ors v Public Prosecutor* [1981] 1 MLJ 84 (per Abdul Hamid FJ (as he then was)), *Kandasamy v Mohamed Mustafa* [1983] 2 MLJ 85 (PC) (per Lord Brightman) and *Goh Leng Kwang v Teng Swee Lin & Ors* [1994] 2 MLJ 5 (Singapore). Even learned counsel for the appellants did not disagree with the principles stated in those cases. We shall not repeat them except to quote a few short passages from the judgments and point out the contexts in which they were made.

[19] In *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209 at p 211, HT Ong (CJ (Malaya)) said:

> This view of the trial judge as to the credibility of a witness must be given proper weight and consideration. An appellate court should be slow in disturbing such

finding of fact arrived at by the judges, who had the advantage of seeing and hearing the witness, unless there are substantial and compelling reasons for disagreeing with the finding: see *Sheo Swarup v King-Emperor* AIR 1934 PC 227.

[20] It must be noted that, in *Herchun Singh*'s case, the police report made shortly after the robbery by the complainant, not only failed to identify the appellants but contained a further statement 'I do not know them (saya tidak kenal)'. This was contradicted by the complainant who denied those words, in fact, he remembered telling the police about Adaikan, the third appellant, as well as giving a description of the first appellant. He remembered telling the policeman who wrote the complainant's police report that there were Sikhs among the robbers and that one of them was a brother of the estate watchman but whose name he could not recollect at the time he made the report. Ong Hock Thye (CJ (Malaya)) then said:

> The learned trial judge, having heard the complainant's explanation, was satisfied that the latter was still very much shaken by the alarming experience he had undergone when he made his report but that, despite his agitation, he did mention the names to the police. This was a finding of fact that the report which was taken down contain errors and omissions for which the constable was responsible.

[21] This passage is then followed by the passage quoted earlier. So, that passage must be read and understood in the light of that finding of fact i.e. that the police report contain errors and omissions. Indeed, in *Herchun Singh*'s case (*supra*) the learned Chief Justice (Malaya) distinguished *Ah Mee v Public Prosecutor* [1967] 1 MLJ 220 (FC). In that case, a rape case, the Federal Court held that in view of the inconsistencies in the evidence of the complainant it was unsafe to rely on her uncorroborated evidence and therefore the conviction must be set aside. This is in spite of the fact that the trial judge considered that the complainant's credibility was unimpeached and had stated that he was personally impressed by his demeanour.

[22] *Ah Mee* is a case where the complainant's own evidence is inconsistent, not a case in which the evidence of one witness on a particular point is contradictory to that of another witness, and the judge believes one witness and not the other.

[23] We shall only refer to another Federal Court judgment in *Lai Kim Hon & Ors v Public Prosecutor* [1981] 1 MLJ 84. In that case, in a passage quoted by the Court of Appeal in the instant appeal, Abdul Hamid FCJ (as he then was) said:

> Viewed as a whole it seems clear that the finding of fact made by the trial judge turned solely on the credibility of the witnesses. The trial judge heard the testimony of each witness and had seen him. He also had the opportunity to observe the demeanour of the witnesses. Discrepancies will always be found in the evidence of a witness but what a judge has to determine is whether they are minor or material discrepancies. And which evidence is to be believed or disbelieved is again a matter to be determined by the trial judge based on the credibility of each witness. In the final analysis it is for the trial judge to determine which part of the evidence of a witness he is to accept and which to reject. Viewed in that light we did not consider it proper for this court to substitute its findings for that of the learned trial judge.
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> The principle of law governing appeals in criminal cases on questions of fact is well established, in that the Appeal Court will not interfere unless the balance of

evidence is grossly against the conviction especially upon a finding of a specific fact involving the evaluation of the evidence of a witness founded on the credibility of such witness.

[24] In that case the Federal Court did not interfere with the finding of the trial judge because the court was of the view that the trial judge had enough evidence before him which, if believed, would justify his finding the appellant guilty.

[25] Of course, the general principle is not in dispute. However, it is the application of the principle to a particular situation that is difficult and, more often than not, in dispute.

[26] Clearly, an appellate court does not and should not put a brake and not going any further the moment it sees that the trial judge says that that is his finding of facts. It should go further and examine the evidence and the circumstances under which that finding is made to see whether, to borrow the words of HT Ong (CJ (Malaya)) in *Herchun Singh*'s case there are substantial and compelling reasons for disagreeing with the finding.' Otherwise, no judgment would ever be reversed on question of fact and the provision of s 87 CJA 1964 that an appeal may lie not only on a question of law but also on a question of fact or on a question of mixed fact and law would be meaningless.

[27] Azizan's credibility was attacked, first, through the impeachment proceeding and, having failed in the impeachment proceeding, on ground of contradictions in his evidence made in the earlier trial and in this trial. The learned trial judge correctly stated in his judgment that the 'defence is entitled to embark on the assault of the credibility of Azizan based on the facts of the case even after a ruling has been made by the court that his credit is saved.' — see p 250, letter 'G' of [2001] 3 MLJ. The Court of Appeal, after citing the learned trial judge at length and stating the law, agreed with the decision of the learned trial judge on the impeachment proceeding and the learned trial judge's finding that 'Azizan was a reliable, credible and truthful witness notwithstanding some of the discrepancies and contradictions that were highlighted by the defence.' — see p 215 of [2004] 1 MLJ 177.

[28] It is said that these are concurrent finding of facts of the two courts but, again, that does not mean that this court should shy away from analysing the evidence to see whether there are 'substantial and compelling reasons for disagreeing with the finding', again borrowing the words of HT Ong (CJ (Malaya)) in *Herchun Singh.*

IMPEACHMENT PROCEEDING

[29] The impeachment proceeding was in respect of Azizan's inconsistent statements in his testimony in the previous trial and in this trial. The inconsistent statements are, in brief, in the first trial he said he was not sodomised by the first appellant after May 1992. But in this trial, he said that he continued to be sodomised after that. This becomes of utmost importance because the charge, as finally amended, gives the date of the offence as from January until March 1993. His explanation was that what he meant by the earlier statement was that he was not sodomised in the first appellant's house after May 1992.

[30] The learned trial judge accepted Azizan's explanation that what he meant by the statement that he was not sodomised by the first appellant after September (later, May) 1992 was that he was not sodomised in the first appellant's house. His reason was that the questions were asked in relation to his visits to the first appellant's house after May 1992. The Court of Appeal found that there was nothing wrong with the conclusion of the learned trial judge. Even though we are not absolutely satisfied with the explanation, we are not inclined to disturb that finding for the following reasons. First, unlike the learned trial judge, we do not have the advantage of seeing and hearing the witness.

[31] Secondly, in an impeachment proceeding, Azizan was placed in the position of an accused. Therefore, if there is any doubt, the benefit of the doubt should be given to him.

[32] Thirdly, the effect of impeachment seems to be very harsh. Not only his whole evidence will be disregarded, he is also liable to prosecution for perjury. On the question whether, where a witness is impeached, his whole evidence is to be disregarded, there appears to be conflicting decisions in our courts. Earlier cases seem to take the rigid view that once a witness is impeached, his whole evidence becomes worthless (see *Koay Chooi v Regina* [1955] MLJ 209; *Matthew Lim v Game Warden, Pahang* [1960] MLJ 89 and *Public Prosecutor v Munusamy* [1980] 2 MLJ 133 (FC)). On the other hand, in *Public Prosecutor v Mohd Ali bin Abang & Ors* [1994] 2 MLJ 12, Chong Siew Fai J (as he then was) took the view that the fact that the credibility of a witness is impeached does not mean that all his evidence must be disregarded. It is still incumbent upon the court to carefully scrutinize the whole of the evidence to determine which parts of her evidence are the truth and which should be disregarded. The learned judge followed the Singapore case of *Public Prosecutor v Somwang Phattanasaeng* [1992] 1 SLR 138. Indeed there is also another Singapore High Court case to the same effect: *Public Prosecutor v Mohammed Faizal Shah* [1998] 1 SLR 333. However, no reference was made to the earlier Malaysian cases, including the judgment of this court in *Munusamy* (*supra*).

[33] As the point was not argued before us, and also since it is not necessary for this court to decide on the issue in this appeal, we would leave it to another occasion and in a proper case for it to be decided upon by this court, if it need be.

[34] The point is, if we accept the view prior to *Mohd Ali bin Abang* (*supra*), which we should, in view of *Munusamy*, a Federal Court judgment, then the effect of an impeachment order, if made against Azizan would be very drastic. Not only that, he may even be subject to prosecution.

[35] But, the fact that he was not impeached does not mean that his whole evidence must be believed. His evidence will have to be scrutinised with care, bearing in mind the dent in his credibility caused by his contradicting statements. At the end of the day, his evidence may be found to be reliable in some parts and not in others. And, at that stage, if there is any doubt, the benefit of the doubt must be given to the appellants because they are the accused.

AZIZAN'S EVIDENCE REGARDING THE DATE OF OFFENCE

[36] The only person who was present during the alleged incident, other than the appellants, was Azizan. The person who was alleged to have been sodomised was Azizan. So, he should be the only person, other than the appellants, who should know when he was sodomised.

[37] Is he really consistent in his evidence about the 'date' of the offence?

[38] The first time he mentioned about the date of sodomy (at luxurious hotels), was in exh P14C/P5 dated 5 August 1997. The period given was around 1992 ('sekitar tahun 1992'). But, in P14C/P5 he did not mention Tivoli Villa. So we do not know whether he meant to include it or not. In any event, in the charge dated 5 October 1998 against the first appellant regarding Tivoli Villa incident, the date of the commission of the offence was stated as 'May 1994' (Jilid 1, p 239).

[39] Who gave the 'May 1994' date to the police? Logically, the date of the commission of the offence could only come from Azizan as he was the 'victim', the only person present other than the appellants.

[40] In this trial, on 3 August 1999, Azizan was cross-examined by Mr Christopher Fernando:

S: Adakah kamu beritahu pihak polis kamu diliwat pada bulan Mei 1994?

J: Saya tak ingat.

…

S: Adakah kamu tahu tuduhan asal terhadap Dato' Seri Anwar adalah pada Mei 1994?

J: Ya, saya tahu.

S: Adakah kamu diberitahu polis kamu diliwat pada bulan Mei 1994?

J: Saya tak ingat.

(Jilid 2, pp 992 to 993)

[41] On 4 August 1999, still under cross-examination:

S: Adakah awak beritahu polis bahawa awak diliwat oleh Dato' Seri Anwar dan Sukma pada bulan Mei 1994?

J: Tidak.

(Jilid 2, p 999)

[42] Still under cross-examination on 9 August 1999:

S: Adakah tidak sebelum hari ini awak ada memberitahu mahkamah ini bahawa awak tidak ada memberitahu polis bahawa awak diliwat oleh Dato' Seri Anwar dan Sukma pada tahun 1994?

J: Ada.

S: Jikalau awak tidak beritahu tarikh iaitu tahun 1994 siapakah beritahu polis ianya berlaku dalam bulan Mei 1994? (Tidak ada jawapan).

(Jilid 2 pp 1028 to 1029)

[43] On 16 August 1999, now under re-examination by the Attorney General:

S: Adakah awak katakan apa-apa kepada polis mengenai apa-apa kejadian dalam tahun 1994.

J: Saya beritahu polis yang saya ada diliwat pada tahun 1994.

(Jilid 2, p 1055)

[44] So, having denied that he informed the police that he was sodomised by the appellants in 1994, he finally admitted that he did tell the police that he was sodomised in 1994. That answers the question that he earlier on did not answer when asked: If he did not tell the police the 1994 date, who informed the police that the incident happened in May 1994?

[45] On 23 April 1999, the second appellant was charged. The date of the offence was given as 'May 1992'. Three days later, on 27 April 1999, the charge against the first appellant was also amended from 'May 1994' to 'May 1992'. How did this date come about? SAC1 Musa provides the answer: it was based on 'other statements' made by Azizan (Jilid 2, p 1101). After the amendment, notices of alibi were served on the prosecution. Then, it was found that the construction of Tivoli Villa had not been completed yet!

[46] On this point, the evidence of Azizan given on 4 August 1999 reads:

S: Setuju atau tidak pada bulan Mei 1992, Tivoli Villa (belum siap dibina)?

J: Setuju.

(Jilid 2, p 998).

[47] On 7 June 1999 the charges were amended from 'May 1992' to 'between the month of January until March 1993'.

[48] On 3 August 1999 under cross-examination, Azizan said that he gave that 'date' to the police on 1 June 1999 (Jilid 2, p 993).

[49] Towards the end of his evidence, when re-examined by the then Attorney General, another point cropped up. Azizan said:

J: SAC1 Musa telah meminta saya untuk mengingati dengan jelas tentang *kejadian pertama kali saya diliwat di Tivoli Villa*. (Emphasis added.)

(Jilid 2, p 1064)

[50] Note that he now talked about SAC1 Musa asking him to remember the incident that he was sodomised by the appellants *for the first time* at Tivoli Villa. SAC1 Musa (SP9) also said the same thing:

J: Saya minta Azizan mengingatkan *tarikh pertama kali* dia di liwat oleh Dato' Seri Anwar dan Sukma di Tivoli Villa. (emphasis added).

(Jilid 2, p 1096)

[51] So, even at the end of his evidence, while he was certain about the January until March 1993 date, he came up with another poser: Was there a second or third incident that he was sodomised by both the appellants at Tivoli Villa?

[52] To sum up, he gave three different dates in three different years, the first two covering a period of one month each and the third covering a period of three months as the date of the alleged incident.

[53] Regarding his finding on Azizan's credibility, the learned trial judge said:

> It is to be observed that May 1994 and May 1992 are not the months we are concerned with in the instant charges against both the accused. These months are relevant only in respect of the earlier charges which have been amended. We are not concerned with these charges. I had dealt with the amendment of these charges earlier in this judgment and had ruled that the amendment was lawfully made in the proper exercise of the discretion by the Attorney General. In his testimony Azizan said he was confused because he was asked about the months of May 1994 and May 1992 repeatedly as stated above. I find as a fact that he was confused. When a witness is confused, it does not mean he was lying. The naked truth is that he could not remember what he had said. I am satisfied he was not lying. In any event, the issue whether he told the police he was sodomized in May 1994 and May 1992 are not the issues in the current charges against both the accused. The issue is whether he was sodomized by both the accused between the months of January and March 1993 at Tivoli Villa. I therefore rule the credit of Azizan is not affected on this score.
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> It was also argued that the evidence of Azizan cannot be accepted in the light of the evidence of SAC1 Musa. It was pointed out that SAC1 Musa in is evidence said five statements were recorded from Azizan and that all these statements were in relation to sodomy. The allegations are consistent and true. He also testified that there was a necessity to amend the charges because there were contradictions in the date. It was submitted that there were two versions of the prosecution case on a fundamental ingredient ie the dates. In this respect, it is necessary to recapitulate what Azizan had said about the dates. In his evidence which I had referred to earlier he was confused about the dates as he was asked repeatedly the same questions on the dates May 1994 and May 1992. In substance what he said on this issue was that he could not remember whether he told the police he was sodomized in May 1994 although he did say that he did not inform the police that he was sodomized in 1992.
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> Be that as it may, the evidence of SAC1 Musa clearly states that Azizan was consistent in his statements on the issue of sodomy although he was not sure of the exact dates. The relevant dates we are concerned with in the present charges are between the months of January and March 1993. Azizan emphatically said in evidence that he was sodomized by both Dato' Seri Anwar and Sukma at Tivoli Villa between January to March 1993. Whether he was sodomized in May 1994 or May 1992 is not relevant as these dates are not in issue to be decided in this case. I see no merits on this contention and the credit of Azizan is not affected on this ground.' (Pages 255 to 256 of [2001] 3 MLJ).

[54] It is true that May 1994 and May 1992 are not the dates that we are concerned with in the instant charges. But, in determining whether Azizan's evidence regarding the date in the present charges is reliable or not we do not think that they are not relevant. All the dates must have been given by Azizan as he was the 'victim' and the only person present during the incident other than the appellants. Indeed evidence shows that he did give those dates to the police. We accept that he may not be lying. He may be confused. May be he cannot remember because the incident happened many years earlier and unlike in most sexual cases, he did not lodge a police report immediately. In fact

he did not lodge a police report at all. But, the fact that he may be confused or he cannot remember is the point. You do not prove a thing by forgetting or by being confused about it. That is why the charge against the first appellant had to be amended twice. The fact that the amendments were lawfully made is of no consequence. We accept that the amendments were lawfully made. But, we are talking about the consistency of Azizan's evidence regarding the date of the commission of the offence.

[55] And, it is not a matter of one or two days, one or two weeks or even one or two months. It covers a period of three years (1992, 1993 and 1994) and, even the last date given was one night in a period of three months.

[56] Furthermore, we note that on the issue whether he informed the police that he was sodomised in 1994, having said he could not remember twice, Azizan denied informing the police, but under re-examination he admitted that he did inform the police of the fact. We also note that the learned trial judge had recorded his observation of Azizan when giving evidence, eg 'tidak ada jawapan', 'witness is very evasive and appears to me not to answer simple question put to him.'

[57] In the circumstances, even though, for the reasons that we have given, we do not interfere with the finding of the trial judge in the impeachment proceeding, when we consider Azizan's evidence as a whole, we are unable to agree with the 'firm finding' of the learned trial judge and the Court of Appeal that Azizan 'is a wholly reliable, credible and truthful witness'. Evidence does not support such a finding. He was most uncertain, in particular about the 'date' of the offence, not just the day or the week or even the months but the year. We do not say he is an 'outright liar' as Mr Christopher Fernando was trying to convince us. But, considering the whole of his evidence, he is certainly not the kind of witness described by the learned trial judge.

IS AZIZAN AN ACCOMPLICE?

[58] Both the High Court and the Court of Appeal found that Azizan was not an accomplice. On this point too we are not going to repeat the law which has been stated by both the High Court and the Court of Appeal. Instead, we will focus on the facts.

[59] The reason for his finding that Azizan was not an accomplice is to be found in this paragraph.

> In the instant case the evidence shows that Azizan was invited to visit Tivoli Villa by Sukma. Azizan went there to see Sukma's new apartment. He went there not with the intention of committing sodomy with both the accused. His actus reus alone is not sufficient to make him an accomplice, there must also be the intention on his part (see *Ng Kok Lian*'s case). For reasons I therefore find that Azizan is not an accomplice.
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> (p 250 of [2001] 3 MLJ)

[60] The Court of Appeal added nothing to it in agreeing with the finding of the learned trial judge.

[61] In our view, if the learned trial judge was looking for *mens rea* he should look at the surrounding circumstances. This is where evidence of similar facts becomes relevant. This is not a case of a person who was merely present at the time of the commission of the offence or participated in it only once. By his own evidence, he was sodomised 10 to 15 times at various places, including in the house of the first appellant over a number of years. He never lodged any police report. He never complained about it until he met Ummi in 1997. He did not leave the job immediately after he was sodomised the first time, we do not know when. Even after he left the job, he went back again to work for the first appellant's wife. Even after he left the second time, he continued to visit the appellant's house. He even went to the first appellant's office. When invited by the second appellant to go to Tivoli Villa, he went. He said he was surprised to see the first appellant there. Yet he stayed on. Signalled to go into the bedroom, he went in. There is no evidence of any protest. He followed whatever 'instructions' given to him.

[62] He said he submitted under fear and was scared of both the appellants. A person may allow himself to be sodomised under fear once or twice but certainly not 10 to 15 times over a number of years. He is not a child nor an infirm. Even on this occasion, when he saw the first appellant there, he would have known of the possibility of the first appellant wanting to sodomise him again. Why did he not just go away? Instead, by a mere signal, he went into the bedroom, as if he knew what was expected of him. He did nothing to resist, in fact co-operated in the act. And, after the first appellant had finished and went to the bathroom, he remained in that 'menungging' position. What was he waiting for in that position? Indeed the whole episode, by his own account, appears like a repetition of a familiar act in which each actor knows his part. And, after that he went back to the place again, twice and talked about the incident as 'the first time' he was sodomised there, giving the impression that there was a second or third time. Are all these consistent with a person who had submitted under fear? We do not think so. Therefore, in our judgment Azizan is an accomplice, though he may be a reluctant one.

SECOND APPELLANT'S CONFESSION

[63] The prosecution sought to introduce the confession of the second appellant recorded by En Abdul Karim bin Abdul Jalil, a session's court judge acting as a magistrate ('the magistrate') on 17 September 1998.

[64] A trial within a trial was held. At the end of it the learned trial judge held that the confession was properly recorded and voluntarily made and admitted it as evidence. The Court of Appeal agreed with him.

[65] The attack on the confession can be divided into two parts. The first was on what the magistrate did or did not do in recording the confession. This has been enumerated by the learned trial judge as points (a) to (g) — see p 232 of [2001] 3 MLJ. We have no reason to differ from the findings of the learned trial judge on those points.

[66] The second part is on the issue of voluntariness of the confession. In this regard, the fact the magistrate who recorded the confession said that he was satisfied that the confession was made voluntarily, does not mean that

the trial court must accept that the confession was voluntarily made. The magistrate formed his opinion from his examination, oral and physical, and his observation of the confessor. He formed his opinion from what he saw of the confessor and what was told to him by the confessor, in answer to his questions or otherwise. A confessor may, at the time of making the confession, tell a magistrate that he is making the confession voluntarily and the magistrate may believe him. But, that does not mean that the trial court must automatically accept that the confession was voluntarily made and therefore admissible. If that is the law, then the trial within a trial would not be necessary at all because every confession that is recorded by a magistrate is recorded after the magistrate is satisfied of its voluntariness. But, though the magistrate may be justified based on his examination and observation of the confessor that the confessor was making the confession voluntarily, the trial court, after holding a trial within a trial and hearing other witnesses as well, may find otherwise. That is what a trial within a trial is for.

[67] We do not question the opinion of the learned magistrate that he was satisfied that the second appellant was making his confession voluntarily. Neither do we find that the other grounds forwarded in respect of the recording of the confession have any merit.

[68] What is more important is for this court to examine whether the finding of the learned trial judge that the confession was voluntarily made after the trial within a trial is correct.

[69] In this regard too, the learned trial judge had stated the law correctly which was amplified by the Court of Appeal (see pp 228–229 of [2004] 1 MLJ). We agree with them. However, we would like to add that, of late, this court, in considering the voluntariness of cautioned statement made under s 37A of the Dangerous Drugs Act 1952 has accepted that if there appears to be 'suspicious circumstances surrounding the making of, or recording of, the cautioned statement' it is incumbent on the trial judge to hold it inadmissible: *Tan Ewe Huat v Public Prosecutor* [2002] 1 MLJ 145 FC. In so doing, this court followed the judgment of the Court of Appeal in *Chan Ming Cheng v Public Prosecutor* [2002] 3 MLJ 733 in which Gopal Sri Ram JCA, delivering the judgment of the court said:

> There is no burden on an accused person to prove that the statement recorded from him is involuntary. The burden lies on the prosecution to show positively that the statement was voluntarily given. There is also no burden on an accused to raise a reasonable doubt as to the voluntariness of a cautioned statement. The only burden on an accused is to show suspicious circumstances surrounding the making of or recording of the cautioned statement. So long as the suspicion is reasonable as to the voluntariness of the statement, it is incumbent on the trial judge to hold it inadmissible.

[70] It must be pointed out that the provisions of s 37A(1)(a) of the Dangerous Drugs Act 1952 is similar to the provisions of s 24 of the Evidence Act 1950.

[71] In dealing with this issue, it appears to us that the learned trial judge considered each allegation by the second appellant and denial by the police officers in question and concluded that he believed the police officers and held that the confession was voluntarily made.

[72] In the circumstances of this case which, we must say, is different from any other case that we know of, we think we have to consider the whole circumstances surrounding the arrest of the second appellant and the related investigations.

[73] As we are considering the question of voluntariness of the confession which is a question of fact, we have no choice but to reproduce the evidence, even though it is quite long.

[74] We shall summarise the evidence of the second appellant first. The second appellant was arrested by ASP Rodwan (TPW3) and three other police officers at about 1pm on 6 September 1998 at Societe Cafe, Lot 10 Shopping Complex, Bukit Bintang. He was then having lunch with his sister Komalawati (TDW2). He was taken to the lower ground of Lot 10 and pushed into a Proton Saga car and his hands were handcuffed. He was then taken to his car. ASP Rodwan and the other police officers ransacked ('membongkar') his car in the presence of the public. From there he was taken to Bukit Aman. During the journey, ASP Rodwan played the speech of the first appellant condemning ('memaki dan mencaci') the former Prime Minister.

[75] They stopped at Bukit Aman only to park the second appellant's car and then proceeded to his apartment at Tivoli Villa. In the car he was verbally abused ('memaki hamun'). At the apartment they ransacked the whole place but did not find anything that they were looking for. They broke the door of the room of the second appellant's sister in spite of the fact that he told them that the key was with her. Between 3pm to 4pm he was taken to Bukit Aman. At ASP Rodwan's office he was asked to sit at one corner with his hands handcuffed. At that time, they were jumping merrily ('bersuka-suka dan meloncat-loncat'). ASP Rodwan was filling a form. At that time the second appellant heard Zaini, one of the officers, asking ASP Rodwan: 'Boss, borang nak tahan dia ni atas dasar apa?' Rodwan jawab 'Entah.' He was taken to the lock-up. Before entering he was asked to remove all his clothes except for his under pants. He was not given food that evening/night as he was told by the officer in charge of the lock-up that meal time was over. In fact he had not eaten the whole day.

[76] On the second day, in the morning, 7 September 1998, he was taken to ASP Rodwan's offfice. There he met a person by the name of 'Zul' (ASP Zulkifly bin Mohamed, TPW4). After ascertaining his identity, according to the second appellant, ASP Zulkifli lifted his shirt and pinched his nipple while making fun of him using shameful words ('memulas-mulas buah dada (nipple) saya dengan sekuat-kuatnya dengan mempersendakan diri saya dengan kata-kata yang memalukan'). At the office, ASP Rodwan asked him to make a statement regarding his homosexual relationship with the first appellant. When he denied, ASP Rodwan challenged him to take an oath with the Quran in the presence of a religious teacher ('Ustaz'). He accepted the challenge but no 'Ustaz' came.

[77] Later in the same day, 7 September 1998, he was taken to see a magistrate. The magistrate made a remand order of two weeks straight away.

[78] In the afternoon, he was taken back to Bukit Aman. There ASP Rodwan told him that he was under his (ASP Rodwan's) detention ('di bawah tahanan

saya') and it was better for him to tell about his (the second appellant's) homosexual relationship with the first appellant. When he denied, ASP Rodwan told him if he was prepared to talk he could go home faster. If not he would be handed over to the Special Investigation Unit which officers were very rough and he would regret later.

[79] He also said he was suffering from asthma and at night it became worse and he asked to be allowed to wear his T-shirt to cover his chest.

[80] At about 7am on the third day, 8 September 1998, two officers took him to a meeting room at the third floor. There were six officers in the room. In the room he was asked to strip naked, while still being handcuffed and he was asked to turn around so that they could see his whole body. When he sat down on a chair, all the officers simultaneously scolded him: 'Who ask you to sit down?' They removed his spectacles and knocked it ('mengetuk-ngetuk') as if to break it. After he sat down an officer stood up, kicked his chair and he fell down. They did not question him then. They merely scolded him simultaneously and continuously very close to his ears in a very high and rough tone. This went on until about 1.30pm. He was in that room from about 8am or 8.30am to about 1.30pm.

[81] After lunch, at about 2pm or 2.30pm he was taken to the same room again. The same thing happened again, until about 4.30pm or 5pm.

[82] On the fourth day, 9 September 1998, he was taken to a room. There were a few people there including one Dr Zahari (Dr Zahari Noor (TDW5)). Dr Zahari examined his whole body paying particular attention to his private part and his anus. He also inserted his finger into his (the second appellant's) anus. He was naked during the examination. ASP Rodwan directed the cameraman to take photographs of the second appellant while naked but Dr Zahari stopped it as he did not require the photographs. But ASP Rodwan said it was necessary for the purpose of the investigation. Photographs of him, naked and in various positions and close-ups of his private part, were taken (and in fact tendered in the main trial as P7 A–G.)

[83] After that he was taken to the same room on the third floor again. There were six people there. The second appellant identified K/Insp Sampornak bin Ismail (TRW2), D/Kpl Ahmad Bustami bin Ayob (TRW3), D/Kpl Mokhtaruddin bin Suki (TRW5), D/Kpl Hamdani bin Othman (TRW4). They told him that the photographs would be used as evidence, but not for what.

[84] As had happened on the previous day, he was roughly scolded until about 4.30pm or 5pm.

[85] On the fifth day, 10 September 1999, the interrogation continued. On that day they were rougher. They threatened that if he did not follow their instructions he would be detained under the Internal Security Act for two years and then for a further two years. They also told him that he could be charged like Dato' Nalla. They could place bullets in his car which was then at Bukit Aman. They also threatened him that they could pay someone to shoot him and no one would suspect the police for it.

[86] On 11 September 1998, the sixth day, his stand was not strong anymore ('saya tidak lagi teguh dengan pendirian saya') because he could no longer bear what was being done to him and he followed their instructions. After that they became nice to him. They removed the handcuff, lowered their voices, allowed him to wear shirt and trousers, gave him drink, cigarette and cakes in the morning. Asked by learned counsel, what they wanted from him, the second appellant said that they wanted him to admit that he had sexual relationship with the first appellant.

[87] The interrogation continued on the following days, in a more friendly manner.

[88] On 16 September 1998, the eleventh day of his detention, at about 7.30am or 8.30am ASP Rodwan came to see him at the lock-up. He informed the second appellant that he should make a statement before a magistrate. He agreed after ASP Rodwan told him that he would be released after making a confession before a magistrate. On the following day, 17 September 1998, the 12th day, he was taken to see the magistrate (TPW1) who recorded his confession. Asked by his counsel how he could make such a long confession, about 10 or 12 pages, he said he was guided by ASP Rodwan repeatedly. ASP Rodwan also told him it was all right if he were to make mistakes but what was more important was to give a clear and detailed evidence ('keterangan') about his homosexual relationship with the first appellant and Azizan.

[89] Cross-examined by Mr Karpal Singh he said that from 6 September 1998 to 16 September 1998 he was taken to the interrogation room every day including Sunday. Each day he was interrogated from about 8.30am to 1pm and from about 2pm or 2.15pm until 4.30pm, though at times until 5.30pm or even 6.30. It was about eight hours a day for 10 days.

[90] Still under cross-examination by Mr Karpal Singh, on 18 September 1998 (one day after the confession was recorded) SAC1 Musa told him that if he engages his own lawyer he would be charged under s 377B of the Penal Code but if he uses the lawyer appointed by him ('jika saya gunakan yang dia lantik') he would only be charged under s 377D and would be sentenced to three months only. The lawyer in question is En Mohd Noor Don who went to see him at about 4.30pm on the same day, 18 September 1998. He said Mohd Noor Don told him if he pleaded guilty and said he had repented ('bertaubat') he would only be sentenced to one day imprisonment.

[91] Under cross-examination by Dato' Gani, he admitted that he had filed an affidavit in Criminal Case No 44–166–1998 that the name of the lawyer mention by SAC1 Musa was Zulkifli Nordin instead of Mohd Noor Don. He also admitted that on 30 September 1998 (note that this is 11 days *after* he was charged in the sessions court in which he was represented by Mohd Noor Don) he signed a letter confirming that Mohd Noor Don had acted for him on 19 September 1998 on his instructions. However, he said he was forced to sign the letter by SAC1 Musa. Then he was referred to Tun HS Lee Police Report No 25536/98 (Exh TP1) lodged by the second appellant.

[92] Under re-examination he explained the inconsistency between his affidavit dated 10 December 1998 while he was under detention at Bukit Aman and his evidence in court thus: Mohd Noor Don told him that SAC1 Musa

told him (Mohd Noor Don) that he (the second appellant) would be sentenced to one day imprisonment but the second appellant told Mohd Noor Don that SAC1 Musa had told him (the second appellant) that the sentence would be three months. Mohd Noor Don then went to see SAC1 Musa and came back and told him (second appellant) that he (Mohd Noor Don) had confirmed with SAC1 Musa that the sentence would be one-day imprisonment.

[93] He also confirmed that the letter dated 30 September 1998, signed by the second appellant confirming the appointment of Mohd Noor Don as his (the second appellant's) counsel was prepared by SAC1 Musa.

[94] An important witness for the second appellant in the trial within a trial is Mr Ganesan a/l Karupanan, an advocate and solicitor (TDW4). He said that he was appointed to act for the second appellant on 6 September 1998. On the next day, he came to know that the second appellant was at Bukit Aman. He wrote a letter to the Inspector General of Police. On 8 September 1998 in an attempt to meet the second appellant, he went to see ASP Rodwan at Bukit Aman. He was told that he had to get the permission of SAC1 Musa.

[95] On the following day, 9 September 1998 he wrote to SAC1 Musa informing him that the second appellant's sister would like to see him. He tried to see the second appellant on 7, 8, 9 and 11 September 1998 but was not successful. He even wrote to the Attorney General seeking his assistance. On 14 September 1998 ASP Rodwan called him and told him to go to his office because he wanted to record a statement from him. He also contacted SAC1 Musa who told him the same. Neither SAC1 Musa nor ASP Rodwan contacted him before the second appellant was charged in the sessions court on 19 September 1998. Under cross-examination by Mr Christopher Fernando he said he made six attempts altogether, three were purely to see the second appellant and the other three were in respect of the recording of his statement.

[96] Under cross-examination by Mr Karpal Singh he said that between 7 September 1998 until 18 September 1998 he was not told by the police or the Attorney General's Chambers that some other lawyer had taken over as counsel for the second appellant. However, on 19 September 1998 the day the second appellant was charged in the sessions court, at 9am he received a telephone call from Mohd Noor Don who told him that the second appellant had appointed him as his counsel. Mohd Noor Don also told him that he received a telephone call from the second appellant the previous night who wanted him (Mohd Noor Don) to act for him.

[97] Regarding Zulkifli Nordin, Ganesan said he told Zulkifli to check what was happening in court on 19 September 1998.

[98] Under cross-examination by Dato' Gani he said he was appointed to act for the second appellant by the socond appellant's sister, Komalawati.

[99] At the beginning of the trial within a trial the prosecution called four witnesses. I shall skip the evidence of En Abdul Karim, the recording magistrate. The second witness, Mr Kathi Velayudhan a/l Palaniappan (TPW2) merely produced the records of proceedings in Criminal Case No 62–135–98, which also includes the confession that was tendered in mitigation.

[100] The third witness was ASP Mohd Rodwan bin Hj Mohd Yunus (TPW3). He informed the court that he arrested the second appellant on 6 September 1998 at about 1pm at Lot 10, Bukit Bintang. On the following day, 7 September 1998, at about 12.45pm he took the second appellant to see a magistrate who made a remand order effective from 7 September 1998 to 20 September 1998 (a period of 14 days).

[101] According to him, on 16 September 1998 at about 3pm, the second appellant was brought to his office. After the second appellant told him something he took the second appellant to see SAC1 Musa. SAC1 Musa asked him to tape the second appellant's confession. The reason was because the case was a sensitive case and it was to avoid accusations ('tohmahan') that it was a police invention being made later. The recording was done from 4.30pm to 5.05pm.

[102] On 17 September 1998, ASP Rodwan took the second appellant to see a magistrate because the second appellant 'wanted to make a confession on his own will'.

[103] Cross-examined by Mr Gobind Singh Deo, ASP Rodwan admitted that the second appellant was investigated in relation to Police Report No 14140/98 lodged by Mohd Azmin Ali mentioned earlier. Asked whether the second appellant was investigated as a witness, ASP Rodwan replied that he recorded the second appellant's statement as a witness. He admitted that he did not contact the second appellant before he was arrested. He admitted that at Tivoli Villa he was told by the second appellant that the key to his sister's room was with her and agreed that they (the police party) broke the door to the room. He admitted, at Tivoli Villa, the second appellant was handcuffed. He denied that the second appellant was made to remove all his clothes except for the under pants while at the lock-up. Asked about his duties in the investigation of the case, he said it was to assist in the investigation regarding the book *50 Dalil*. The interrogation was done by 'Pihak Bantuan Teknik' from the Interrogation and Photography Division of the Criminal Division (my translation). He admitted that when he took the second appellant to see the magistrate on 7 September 1998, it was he who asked for a 14-day remand straight away. He also admitted it was not a normal practice for a magistrate to make a 14-day remand order. When asked, he answered that he took the second appellant to see the magistrate who gave the 14-day remand order at the High Court, not at the magistrate's court, as usual. Asked why, he said it was because he was instructed (by SAC1 Musa) to take the second appellant to see Tuan Mat Zaraai ('kerana saya diarah untuk membawa Sukma untuk berjumpa dengan Tuan Mat Zaraai'). Asked whether it was fixed, he said he did not know. He said that after that he met the second appellant on 9, 10, 16 and 17 September 1998 but he was not present during all the interrogations. He admitted that on 9 September 1998 the second appellant was examined by Dr Zahari Noor (TDW5) who also examined the second appellant's anus and that he (ASP Rodwan) instructed that photographs be taken. He denied that when he took the second appellant to see the magistrate to have his confession recorded he told the second appellant that he would be released the following day if he made the confession.

[104] Cross-examined by Mr Karpal Singh why the second appellant was remanded for 14 days he said it was to investigate further regarding the second appellant's homosexual involvement and to look for witnesses.

[105] Coming to the day the second appellant was charged in court in respect of Criminal Case No 62–135–98, ie on 19 September 1998, ASP Rodwan admitted meeting Zulkifli Nordin, an advocate and solicitor who wanted to meet the second appellant. He also admitted that Ganesan (TDW4) had also tried to meet the second appellant during the latter's detention but was not successful. He admitted that Ganesan had written to him, telephoned him and even saw him on 10 September 1998 for that purpose but he did not allow Ganesan to meet the second appellant.

[106] Re-examined by the deputy public prosecutor, he said that on 19September 1998, the second appellant's counsel was Mohd Noor Don.

[107] The next witness called by the prosecution was ASP Zulkifli Mohamed (TRW4). He accompanied ASP Rodwan to get the remand order on 7September 1998. He denied all the allegations made by the second appellant against him, mentioned earlier.

[108] We now go to the rebuttal witnesses called by the prosecution. The first rebuttal witness was SAC1 Musa bin Hassan (TRW1). He said that at about 9.30am on 18 September 1998 he met the second appellant. He told the second appellant that he would be charged under s 377D of the Penal Code. He showed two letters from Ganesan (TDW4) and asked him whether he would like to appoint the solicitor who wrote those letters. He also showed the second appellant call cards of lawyers for him to choose. On the same day at about 4.30pm he arranged for the second appellant to contact En Mohd Noor Don, by telephone. Mohd Nor Don came to see the second appellant twice. He denied all the allegations made by the second appellant regarding the appointment of Mohd Noor Don and regarding the charge to be preferred against him and the sentence he would receive.

[109] On 30 September 1998 Mohd Noor Don telephoned him. He said he wanted to see the second appellant which he did at 3.40pm. Shown the letter dated 30 September 1998 he denied forcing the second appellant to sign it.

[110] Under cross-examination by Mr Jagdeep Singh Deo, he admitted that he met the second appellant twice, ie on 16 September 1998 and 18 September 1998. He admitted that it was he who instructed that the second appellant's confession be recorded, after 10 days detention. He agreed that according to Ganesan's letter dated 10 September 1998, Ganesan was still acting for the second appellant. However, until 18 September 1998 he did not get a confirmation about Ganesan's appointment. Neither did he contact Ganesan. Asked whether it was usual for him to recommend a lawyer to detainees, his reply was 'Not necessarily'. He denied that when he saw the second appellant on 18 September 1998, he told the second appellant not to use the services of Ganesan and that if the second appellant were to plead guilty he would only be sentenced to three months' imprisonment. He admitted that the second appellant's sister met him when the second appellant was

under remand. Asked why he did not ask the second appellant to get his sister to engage a lawyer for him, he replied that the second appellant was under investigation. Asked whether the second appellant was still under investigation on 18 September 1998, he said 'No'. He also did not provide the second appellant the facility to contact his sister for the purpose of engaging a lawyer. He admitted he was in court throughout the proceeding on 19September 1998 and he met Zulkifli Nordin who informed the court that he was acting for the second appellant. Asked whether he knew that the appointment of Mohd Noor Don was disputed ('dipertikaikan'), he replied that the appointment of Mohd Noor Don was not disputed. He was then shown the notes of evidence of the Criminal Case No 62–11–35–98. The record reads:

En Zulkifli

Keluarga OKT melantik saya untuk mewakili OKT. Keluarga OKT tidak kenal P/OKT. Keluarga OKT mempertikai perlantikan Encik Mohd Nor Don. Minta izin bercakap.'

(My translation

The accused's family has appointed me to represent the accused. The accused's family does not know the accused's lawyer. The accused's family disputes the appointment of Encik Mohd Noor Don. I ask for permission to speak.)

[111] SAC1 Musa was then asked whether the record was wrong. He said I don't know. Put to him that Mohd Nor Don's appointment was disputed. He replied 'No'. He admitted that according to the record Mohd Nor Don asked for one day's imprisonment but denied that it was the same as ('selaras dengan') what he had informed Mohamed Nor Don.

[112] Shown the letter dated 30 September 1998, he said he did not know who typed the letter, but on that day Mohd Nor Don did meet the second appellant at Bukit Aman. He denied it was typed on his instruction.

[113] He was further cross-examined by Mr Karpal Singh. He admitted that in 1997 he investigated the allegations ('tohmahan-tohmahan') against the first appellant. He did not carry out a full investigation in 1997. However he admitted that he recommended that no further action be taken on the file and that a full investigation be carried out first before such recommendation be made. He also admitted that he made similar recommendation to the Attorney General who agreed with him. The file was however re-opened in June 1998 based on the police report by Mohd Azmin Ali concerning the book *50 Dalil.* The following question and answers read:

S: You arranged for a meeting in your office between Mohamed Nor Don and Sukma?

J: Benar, pada 30.9.98.

S: Sebelum tarikh ini, Mohamed Nor Don belum dilantik.

J: Saya setuju.

S: You allowed the use of your office by Mohamed Nor Don to see Sukma.

J: Yes.

[114] He admitted that the second appellant was a timid person and 'most probably' was prone to be more susceptible to breaking down. He was aware of the beating of the first appellant by the Inspector General of Police. He was aware that the second appellant was not questioned within the first 24 hours. He agreed that a statement from the second appellant was video-taped and it was something new. He admitted that he was given a copy of the second appellant's confession on 17 September 1998 by ASP Rodwan (at 6pm).

[115] Under re-examination by the deputy public prosecutor, he explained that he recommended the investigation against the first appellant to be closed in 1997 because the first appellant called him to his office and handed to him letters purportedly signed by Ummi Hafilda and Azizan to the effect that they had withdrawn the allegations ('tohmahan') against the first appellant and directed him to close the investigation as the allegations were unfounded. Regarding the meeting with Mohd Nor Don he said it was the latter who contacted him. He said the investigation was completed on 17 September 1998 after he received the confession. He denied it was he who appointed Mohd Nor Don to act for the second appellant.

[116] The second rebuttal witness was K/Insp Sampornak Ismail (TRW2). He said that on 7 September 1998 at about 3pm he was told by ASP Rodwan to interrogate the second appellant. He carried out the interrogation with five other officers (D/Kpl Ahmad Bustami (TRW3), D/Kpl Mokhtaruddin (TRW5), D/Kpl Hamdani (TRW4), Lee Tuck Seng (TRW7) and Tan Hwa Cheng (TRW6). He was the leader of the team. The interrogation started on 8 September 1998 and completed on 15 September 1998 onwards, he was assisted by three detectives. The interrogations were conducted from 9am to 12.30pm and then from 2pm to 4.45pm. He admitted that at the beginning of the interrogation on 8 September 1998 he asked the second appellant to remove his shirt and trousers to examine whether he had any injury which was a normal procedure. He denied all the specific allegations made by the second appellant which I need not repeat e.g. the kicking of the chair, the knocking of his spectacles, the scolding, the threat etc.

[117] Cross-examined by Mr Gobind Singh Deo, he agreed that the interrogation was in respect of the book *50 Dalil* which he had not seen but was given pp 63 and 64 by ASP Rodwan. Asked who else was mentioned in the book, he replied if he was not mistaken another person by the name of Azizan was also mentioned. Asked whether any other name was mentioned he said he could not remember. Asked whether it was a high profile case, he said he did not understand the meaning of high profile. When explained to him he said 'Now I understand'. Pressed further whether he now knew the name of a 'famous person' ('orang yang terkenal') mentioned in the said pages given to him, he replied: 'Now I know — Dato' Seri Anwar Ibrahim. Before the interrogation, I did not know.' Asked for how long the second appellant was completely undressed on 8 September 1999, he said about four minutes. He admitted that he and four other officers repeatedly questioned the second appellant, but not simultaneously. He denied all the specific allegations made by the second appellant. He repeated that the purpose of the interrogation was to obtain 'intelligence statement' which means 'risikan keselamatan negara' as instructed by ASP Rodwan.

[118] Asked whether the second appellant was a timid person he said he was not clear what 'timid' means. After it was explained to him, he replied: 'He was a normal person' ('Dia seorang yang biasa'). He said that the interrogation was about five to six hours a day.

[119] Under re-examination by the learned deputy public prosecutor, K/Insp Sampornak said he started recording intelligence statement from the second appellant from 13 September 1998 until 15 September 1998. Of course he denied the specific allegations made by the second appellant.

[120] Another rebuttal witness called by the prosecution was D/Kpl Ahmad Bustami bin Ayob (TRW3). Basically his evidence was similar to that of K/Insp Sampornak (TRW2). He said that interrogation ('soal siasat') started on 8September 1998 until 15 September 1998. Out of that, from 8 September 1998 to 12 September 1998 were question and answer sessions. From 13September 1998 to 15 September 1998 K/Insp Sampornak (TRW2) recorded intelligence statement from the second appellant. He said that they treated him as a usual offender ('sebagai pesalah biasa'). Allegations made by the second appellant were put to him by the learned Deputy Public Prosecutor and he too denied them all.

[121] Kpl Hamdani bin Othman (TRW4) was another rebuttal witness called by the prosecution. He too denied all the allegations made by the second appellant.

[122] The evidence of D/Kpl Mokhtaruddin bin Suki (TRW5) is similar to that of the other rebuttal witness. He too denied all the allegations made by the second appellant. Under cross-examination he denied that the purpose of the interrogation was to obtain a confession from the second appellant. It was to obtain 'risikan' (intelligence statement). He stated that the second appellant was not interrogated as a witness, but as an offender ('sebagai seorang yang salah'). Asked what was the offence, he said he did not know.

[123] In the earlier part of the cross-examination he admitted that no confession ('pengakuan') was obtained from the second appellant. But, just before the court adjourned for lunch, the record reads as follows:

S: Adakah kamu dan ahli-ahli yang menjalankan soal siasat puas hati atas jawapan Sukma?

J: Puas hati.

S: Bilakah kamu puas hati dengan jawapannya — hari pertama, hari kedua, hari ketiga?

J: Pada hari yang akhir.

(Jilid 1, p 444)

[124] He said that the interrogation started on 8 September until 15September 1998.

[125] Of course, under re-examination, after the lunch break, he explained it thus:

S: Awak ada mengatakan di dalam soal balas awak berpuashati di hari terakhir. Apa yang kamu puas hati?

J: Saya berpuas hati Sukma telah memberi kerjasama dengan baik dan memastikan segala cerita-cerita telah dijelaskan tidak diada-adakan dan saya tidak mahu ada unsur-unsur penganiayaan.

(Jilid 1, p 748)

[126] [We think we should point out that there appears to be mistake in the notes of evidence at p 749 of Jilid 1 where it was recorded that it was TRW4 (D/Kpl Hamdani Othman) who was giving evidence. If the sequence of the notes of evidence is followed, it should be TRW 5 (Mokhtaruddin Suki)]

[127] We do not think we have to summarise the evidence of the other rebuttal witness.

[128] Our first comment is that there seems to be so many unusual things that happened regarding the arrest and the confession of the second appellant.

[129] First, the second appellant was not arrested pursuant to a report by a victim that he was sodomised as in a normal case. He was arrested pursuant to a report made by Mohd Azmin Ali who complained that the book *50 Dalil* contained blasphemous and shameful allegations ('tohmahan') against him, his wife and his family. The report has nothing to do with the second appellant. But the book contained allegations of homosexual relationship between the first appellant and the second appellant, that too as can be understood, he was the passive participant or the receipient. Had the dominant partner been a 'Mr Nobody', no one would have raised an eyelid. But the 'dominant partner' being the first appellant who was what he was then at the point of time that was then he became important as a source of obtaining evidence against the first appellant. So, he was arrested. What was he arrested for? The second appellant's evidence, though denied, that Zaini asked ASP Rodwan 'Boss, borang nak tahan dia ni atas alasan apa?' and ASP Rodwan's answer 'Entah' seems to offer the answer: They were not sure themselves. However, ASP Rodwan's evidence offers the answer. First, when asked whether the second appellant was investigated as a witness, he answered that the second appellant's statement was recorded as a witness. Later, when asked why he requested for a 14-day remand, he replied: 'Untuk menyiasat lanjut tentang penglibatan OKT dalam homoseksual, dan untuk mencari saksi-saksi.' So, that was the reason: to look for evidence and witnesses regarding the second appellant's involvement in homosexual activities, with whom? Clearly with the first appellant.

[130] But, if that was the reason, why arrest the second appellant and subject him to the kind of interrogation done even if the version of the prosecution witnesses were to be accepted. You call him and record his statement, first, at least.

[131] Secondly, the remand order of 14 days one stretch and the circumstances under which it was obtained is unusual. No questioning was done during the first 24 hours. Then he was taken to see a magistrate to get a remand order, not to the magistrate's court where magistrates are but to see a particular officer at the High Court. We take judicial notice that there are no magistrates in the High Court, only officers who had served as magistrates and who remain gazetted as magistrates. Requested by ASP Rodwan, he gave a 14-day remand order straight away, something that even ASP Rodwan admitted as unusual.

[132] Back in Bukit Aman, intensive interrogation went on for 10 days. The officers kept saying that the purpose of the interrogation was to obtain 'intelligence statements' which was explained by K/Insp Sampornak, the leader of the interrogation team, to mean 'risikan keselamatan negara'. However, the way the interrogation was done justifies D/Kpl Mokhtaruddin Suki (TRW5) to form an opinion that the second appellant was *not* interrogated as a witness, but as an offender even though he did not know what offence. Another rebuttal witness of the prosecution, D/Kpl Ahmad Bustami bin Ayob (TRW3) also said that the second appellant was interrogated as a 'normal offender' ('pesalah biasa').

[133] Thirdly, within two days after the confession was recorded by the magistrate, the second appellant was charged for having allowed the first appellant to sodomise him in April 1998 at the latter's official residence, an offence under s 377D of the Penal Code. Normally, it is the sodomiser who is charged or both are charged together. But, we must make it very clear that there is nothing wrong legally speaking with that charge. But again, we are only looking at all the surrounding circumstances relating to the confession.

[134] Fourthly, the appointment of Mohd Noor Don as counsel for the second appellant in that case is rather unusual too. Ganesan, purportedly appointed by the second appellant's sister, had been trying to see the second appellant. He was not successful in all his attempts. Instead, he was called to Bukit Aman twice to have his statements recorded. Then we have the involvement of SAC1 Musa in the appointment of Mohd Noor Don. It is very pertinent to note that SAC1 Musa admitted that Mohd Noor Don was not appointed by the second appellant before 30 September 1998 which means that he was only appointed 11 days after he had appeared in court and 'mitigated' for the second appellant. Even if we were to accept SAC1 Musa's own evidence (even though we must say, in this respect, the second appellant's version is not improbable) does the fact that he gave Mohd Noor Don's card to the second appellant, arranged for the second appellant to call Mohd Noor Don by telephone, allowed Mohd Noor Don the use of his office to meet the second appellant, denied access by Ganesan even though at earlier stage, and also Mohd Noor Don's tendering of the confession in mitigation (we will say more about this later), the appearance of Zulkifli Nordin in court at the behest of Ganesan to see what was happening, the denial by SAC1 Musa that Zulkifli Nordin disputed the confession even though he was shown the notes of proceedings of the court, the belated letter dated 30 September 1998 (11 days after the second appellant was charged and convicted) confirming Mohd Noor Don's appointment, not raise some suspicion about the actions of the police relating to the confession?

[135] Fifthly, the tendering of the confession by Mohd Noor Don 'in mitigation' of sentence in Criminal Case No 4–62–135–98. Even unrepresented accused do not do such a thing, what more an advocate and solicitor representing an accused person. Tendering a confession stating that an accused has committed other offences in mitigation of sentence is a contradiction in terms, to say the least. When you are pleading for a lenient sentence, you simply do not inform the court that you have committed other offences!

[136] Whether it was the intention or not, the reason for the tendering of the confession in that case, is to be found in this case. The whole notes of proceedings of the case including the confession was tendered in evidence in this case and the tendering of the confession in mitigation of sentence in the Sessions Court case was used as an argument to prove its voluntariness: the second appellant had used it, therefore it has been made voluntarily. Again, we must say, there is nothing wrong legally speaking about it all. But, again, we are looking at the circumstances surrounding the confession to determine whether it was voluntarily made.

[137] We have covered all the 'unusual' circumstances surrounding the confession. Now, a few more things.

[138] First, even the first appellant who, until his dismissal (on 2 September 1998) was the Deputy Prime Minister of Malaysia, was deemed fit to be assaulted by no other than the then Inspector General of Police. Would it not be too much to expect that the second appellant was given a completely different kind of treatment during his detention?

[139] Secondly, it is easier for seasoned police officers to deny specific allegations put to them either by the learned deputy public prosecutor or learned counsel than for the second appellant to create the story especially when it covers a period of about 10 days. In fact, the version given by the prosecution witnesses confirms many of what the second appellant told the court, except for the specific allegations which are denied. Indeed, on those matters, the prosecution's witnesses especially K/Insp Sampornak, even from reading the notes of evidence, can be clearly seen to be evasive.

[140] Thirdly, D/Kpl Mokhtaruddin Suki (TRW5), whose evidence we have reproduced earlier admitted that no confession ('pengakuan') was obtained from the second appellant but on the last day of the interrogation (15 September 1998) they were 'satisfied with his answers.' Note that on the next day, 16September 1998 the taping of the second appellant's statement was done and on the following day, 17 September 1998, the second appellant was taken to see the magistrate who recorded his confession. Although D/Kpl Mokhtaruddin Suki (TRW5) tried to explain it after the lunch break, he appears to say that they did not obtain the confession ('pengakuan') earlier but on the last day (15 September 1998) they were satisfied with the second appellant's 'answers' or as he puts it in the re-examination, he 'had given good co-operation.' In other words, having been satisfied on 15 September 1998, the interrogation stopped, followed by the taping on the following day and the recording of the confession by the magistrate on the next day. It also fits with the second appellant's version.

[141] Fourthly, it was argued that the fact that the second appellant could narrate a story of that length and detail shows that he was not 'programmed' and that he was making the confession voluntarily. Here too, we think, that the defence, in alleging that the confession was 'programmed', was making things more difficult for themselves. Understandably, the defence was trying to clear the appellants totally from any indication of homosexual involvement. But, in so doing, the defence was placing a very heavy burden on themselves.

It is not easy for any court, or indeed any reasonable man, to accept the story that the second appellant was 'programmed' to make a story of that length and detail.

[142] Be that as it may, the fact that the second appellant was not 'programmed' to make the confession does not necessarily mean that the confession was voluntarily made. The fact that the confession is true, if it is true, does not make it admissible if it is not voluntarily made.

[143] Two things should not be confused. Voluntariness and admissibility should not be confused with truth of the confession and the weight to be attached to it. A confession may be true yet if it is not voluntarily made, it is not admissible in evidence. A confession, though false, is admissible in evidence if it is voluntarily made, even though it may not be acted upon when considering the weight to be given to it at a later stage.

[144] The learned trial judge, having stated the law correctly, which we shall not repeat, went on to consider the various allegations made by the second appellant and the evidence of the prosecution witnesses, in which they denied all the allegations made by the second appellant and concluded that he believed the prosecution witnesses. Of course, he had the advantage of seeing and hearing them. But, we do not think that it is just a matter of seeing and hearing the witness. What is more important, in the circumstances of this case, is to look at the broader picture, including all the surrounding circumstances enumerated above. This, with respect, the learned trial judge had failed to do. In our judgment and with respect, that is a misdirection or a non-direction amounting to a misdirection.

[145] We would pose the following questions. Applying the words of s 24 of the Evidence Act 1950, considering all the surrounding and unusual circumstances that we have enumerated, does it *not appear* that the making of the confession has been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person or persons in authority and sufficient in the opinion of the court to give the accused person ground which would appear to him reasonable for supposing that by making it he would gain an advantage or avoid any evil of a temporal nature in reference to the proceeding against him? Applying *Dato' Mokhtar Hashim v Public Prosecutor* [1983] 2 MLJ 232, has the prosecution proved beyond reasonable doubt that the confession was made voluntarily? Or, to put it another way, considering all the circumstances enumerated above, are the allegations of the second appellant so improbable that it does not appear that the making of the confession was not voluntary, or that it does not raise any reasonable doubt that the confession was not made voluntarily? Or, applying the 'classic test' laid down in *Director of Public Prosecutions v Ping Ling* [1975] 3 All ER 175, has the prosecution established 'beyond reasonable doubt that it was voluntary, in the sense that it was not obtained from him either by fear or prejudice or hope of advantage created by a person in authority, or by oppression (which test) should be applied in a manner which is part objective, part subjective'? — per Abdoolcader FCJ in *Dato' Mokhtar Hashim* and cited by the Court of Appeal — see p 229 of [2004] 1 MLJ. Or, applying *Tan Ewe Huat* and *Chan Ming Cheng*, are there no 'suspicious circumstances surrounding the making of' the confession? If we consider these questions

seriously in the light of all the surrounding circumstances that we have enumerated, we do not think that we can reasonably conclude that there was no doubt as to the voluntariness of the confession or that it does not *appear* that it was made involuntarily.

[146] We are asked to believe beyond any reasonable doubt as if, after the arrest and having 'slept' over it, the second appellant was full of repentance and he would like to clear his chest because he had kept the secret for too long. ('Lama sangat dalam dada, saya hendak meluahkan segala-galanya.') We accept that the second appellant had said that to the recording magistrate. It may even be that he was telling the magistrate what he truly felt then. But, under what circumstances did it come about? That must be considered. Itcame after 10 days of intensive interrogation and 12 days of detention (upto the time he made that statement to the magistrate), when for all intents and purposes he was arrested as a witness but interrogated as an offender and ended as an accused, twice. Indeed he was charged two days later for allowing the first appellant to sodomise him the record of which was introduced as evidence in this trial.

[147] With respect, the learned trial judge and the Court of Appeal had failed to consider all the surrounding circumstances, many of which unusual, before and after the confession was made. It may be asked: why should the surrounding circumstance *after* the making of the confession be relevant? It is true that what happened after the making of the confession does not affect the state of mind of the second appellant leading to the making of the confession. But, it reflects on the police officers: it shows that they wanted a confession from the second appellant. Of course there is nothing wrong with that but we are looking at it in determining whether the confession was voluntarily made. The learned trial judge appears to have only considered the specific allegations made by the second appellant regarding the treatment given to him during his detention and during the interrogation and the denials by the police officers and he believed the police officers. The Court of Appeal, without much analysis of the facts, agreed with the learned trial judge. In our judgment there is a serious misdirection that warrants this court to intervene in the finding of the two courts on the issue.

[148] In this respect, we are supported by the *dictum* of Abdoolcader FJ in *Dato' Mokhtar Hashim* at p 272 and quoted by the Court of Appeal in this case at p 229 of [2004] 1 MLJ:

> It is open to an appellate court to interfere with the finding on a question as to the voluntariness of a confession if the impugned finding has been reached without applying the true and relevant tests and consideration of relevant matters (*Sarwan Singh v State of Punjab* AIR 1957 SC 637 at p 643; *Public Prosecutor v Thum Soo Chye* [1954] MLJ 96 at p 99).'

[149] Indeed, the surrounding circumstances in this case are much more serious than those in other cases in which this court and the Court of Appeal had found it fit to interfere eg *Tan Ewe Huat* (FC); *Chan Ming Cheng* (CA); *Hasibullah bin Mohd Ghazali v Public Prosecutor* [1993] 3 MLJ 321 (SC) and *Dato' Mokhtar Hashim* (FC).

EFFECTS OF OUR FINDINGS

[150] Having made our findings on Azizan's evidence, in particular regarding the 'date' of the offence and on the issue whether he is an accomplice and the second appellant's confession, we think we are now in a position to consider the prosecution's case, whether, in view of the said findings, the prosecution had proved the case beyond reasonable doubt that justifies the calling for the defence and a conviction, if he chooses to remain silent. The burden of proof is the same as at the end of the case for the defence. If at the end of the case for the prosecution, the court has a reasonable doubt that any of the ingredients of the charge had been proved, the accused is entitled to an acquittal without his defence being called. This is again trite law.

[151] The court, as a court of law, is concerned with proof in accordance with the requirement of the law, not whether, the judge reading the records is convinced that the incident did happen or not. He must be satisfied beyond reasonable doubt, that every ingredient of the charge has been proved on evidence admissible in law and in accordance with the requirement of the law.

[152] In this respect, the dicta of Abdul Hamid CJ (Malaya) (as he then was) in *Teoh Hoe Chye v Public Prosecutor* (1987) 1 MLJ 220 at p 230 (SC) quoting Ong Hock Thye Ag CJ (Malaya) in *Sia Soon Suan v Public Prosecutor* [1966] 1 MLJ 116 (FC) is worth quoting:

> In this regard, it behoves us to reiterate that 'the requirement of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether the court is otherwise convinced in its own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else … .' (*Sia Soon Suan v Public Prosecutor* [1966] 1 MLJ 116.)

[153] We shall now consider whether, based on our findings on the three main points, at the end of the case for the prosecution, the prosecution had proved its case beyond reasonable doubt, that being the law applicable to this case.

THE 'DATE' OF THE COMMISSION OF THE OFFENCE

[154] The learned trial judge, when discussing the question 'whether the charges are vague or weak' concluded that the charges contain sufficient particulars as required by s 153(1) of the Criminal Procedure Code. The Court of Appeal agreed with him. We too agree with him. *Ku Lip See v Public Prosecutor* [1982] 1 MLJ 194 (FC) is a case on point.

[155] However, we think we have to say something on the oft-quoted sentence from the judgment of Atkin J in *R v Severo Dossi* (1918) 13 Cr App R 158:

> From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence.

[156] The learned trial judge in this case quoted it in support of his statement 'In any event a date in the charge has never been material' when he was discussing whether the charges are vague and weak, not whether it is material that it must be proved. He merely quoted the sentence as quoted in *Law*

Kiat Lang v Public Prosecutor [1966] 1 MLJ 215 (FC) and *Ho Ming Siang v Public Prosecutor* [1966] 1 MLJ 252.

[157] To understand the context in which that statement was made, we should look at the facts of that case.

[158] In that case, a 1918 judgment of the Court of Criminal Appeal in England, the appellant (accused) was charged with indecently assaulting a child 'on March 19th, 1918,' and with indecently assaulting another child 'between September 12th and 30th, 1917.' The jury found the appellant not guilty with regard to the March 19th charge but 'If the indictment covers other dates, Guilty'. They also found him not guilty of indecently assaulting the second child. On the application of the prosecution the Deputy-Chairman amended the indictment by substituting 'on some day in March' for the words 'on March 19th, 1918', and the jury then found the appellant guilty on the amended charged.

[159] The judgment of Atkin J, inter alia, reads:

> The first point taken on behalf of the appellant is that there was no power to amend the indictment, and that when the jury found that the appellant had not committed the acts charged against him on the day specified in the indictment but on some other day or days they found him Not Guilty and that verdict must stand. It appears to us that that is not a correct contention in law. From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence. 'And although the day be alleged, yet if the jury finds him guilty on another day the verdict is good, but then in the verdict it is good to set down on what day it was done in respect of the relation of the felony; and the same law is in the case of an indictment,' 2 Inst 318 … .

[160] It is to be noted that in that case the court was concerned with the power of the court to amend the charge from 19 March 1918 to on some day in March. of the same year as the jury had found that the charge bearing the specific date 19th March had not been proved but it was proved that the offence was committed in the month of March. That is the context in which that statement was made. Even then, the sweeping opening words were qualified by the words 'unless it is actually an essential part of the alleged offence'.

[161] That passage was quoted by the Federal Court in *Law Kiat Liang v Public Prosecutor.* That case is one of the '*Konfrontasi*' cases. In the first charge the date of the alleged offence was given as 'between 2am on 2nd day of September, 1964 and 12 noon on the 4th day of September 1964.'

[162] In the judgment of the court, Thomson LP, after reproducing the charges, straight away went on to say:

> With regard to the first of these charges, the dates are wrong and the charge was at no time amended. This in itself, however, is without importance. As was observed by Atkin J in the case of *Severo Dossi* … .

[163] The learned Lord President went on to cite the same sentence reproduced earlier. Nothing more was said on it. No reference was made the s 153(1) of the Criminal Procedure Code, our written law. However, considering his statement that 'the dates are wrong', it appears to us that in that case, as

in *Severo Dossi* followed by the court, it was proved that the offence was committed on another day (or period) but not the date (or period) specified in the charge. That being the case, it is understandable why having referred to that case he said no more about the appeal before him on that point. The only difference is that in the Federal Court case, the charge was not amended.

[164] The case of *Ho Ming Siang v Public Prosecutor* is similar to *Law Kiat Lang v Public Prosecutor*. Even the date of the alleged offence in the first charge is the same. That part of the judgment is a repetition of what was said in *Law Kiat Lang v Public Prosecutor*.

[165] It must be noted that in all these cases, the court did find that the offences were proved to have been committed on another date, even though not on the date stated in the charges. In the circumstances, the convictions were upheld.

[166] In the instant appeals, it is not that the offences have been proved to have been committed on another day, not being the date stated in the charge. The question of amending the charges does not arise. It is simply a question whether the alleged offences have to be proved to have been committed as per charge, including the date. As has been pointed out, the Federal Court in the two cases referred to earlier did not address its mind to the provision of s 153(1) of the Criminal Procedure Code. Perhaps that was because it was only dealing with the question whether the charges should have been amended. In the instant appeals we are dealing with the question whether, the offences not having been proved to have been committed on another date, it must be proved to have been committed on the date stated in the charges. Section 153(1) of the Criminal Procedure Code clearly states that 'The charge shall contain such particulars as to the time … .' Since it is mandatory to state the 'time' (ie date or period) when an offence is alleged to have been committed, clearly it is a 'material matter' and an 'essential part of the alleged offence', to use the words of Atkin J in the exception stated by him, even if that case is applied. If the law clearly provides that the charge shall contain particulars as to 'time', it follows that such particulars must be proved.

[167] In any event, reading the judgment of the High Court, even though the learned judge did not mention the date of the offence when he listed the ingredients to be proved (see [2001] 3 MLJ 193 at p 276), it is clear from his judgment that when he found that the charges had been proved, he meant the date as well. So, there is really no issue whether the date of the alleged offences as stated in the charges have to be proved. The issue is whether it is proved.

[168] The concluding paragraph of the learned trial judge's judgment on the inconsistencies of Azizan's evidence regarding the date of the offence reads:

> Be that as it may, the evidence of SAC1 Musa clearly states that Azizan was consistent in his statements on the issue of sodomy although he was not sure of the exact dates. The relevant dates we are concerned with in the present charges are between the months of January and March 1993. Azizan emphatically said in evidence that he was sodomized by both Dato' Seri Anwar and Sukma at Tivoli

> Villa between these dates and he gave the reasons for remembering the dates. This evidence was not successfully challenged. It is therefore established on this evidence that Azizan was sodomized by both Dato' Seri Anwar and Sukma in Tivoli Villa between January to March 1993. Whether he was sodomized in May 1994 or May 1992 is not relevant as these dates are not in issue to be decided in this case. I see no merits on this contention and the credit of Azizan is not affected on this ground. (Page 255 to 256 of [2001] 3 MLJ 193)

[169] The only evidence available to prove the date of the commission of the offence is that of Azizan. The second appellant's confession, even if admissible (but which we hold is not) does not help. It was made on 17 September 1998. He mentioned the date as 'Dalam lebih kurang dua atau tiga tahun yang lalu waktu dan tahun yang tepat saya tidak ingat …'. 'Two or three years ago' can only mean in 1996 or 1995. The learned trial judge interpreted that phrase to include 1993. This is what he said:

> In my view, the phrase 'dua atau tiga tahun yang lalu' does not conclusively establish that the date of the commission of the offences could not be 1993. I do not agree with the contention of the defence that 'dua atau tiga tahun yang lalu' would be in 1995 or 1994 because this may also include 1993. This year cannot be excluded for the simple reason that Sukma himself was not sure of the exact date but only giving an estimated date. He could have said with precision that the year was 1994 or 1995 if he was sure that what he meant by 'dua atau tiga tahun yang lalu' refers to these years but he said 'tahun yang tepat saya tidak ingat'. This in my view does not exclude 1993. (Page 263 of [2001] 3 MLJ)

[170] With respect, such an interpretation is unwarranted. The phrase 'waktu dan tahun yang tepat saya tidak ingat' cannot reasonably be interpreted to expand the period of 'dua atau tiga tahun yang lalu'. The phrase 'tahun yang tepat saya tidak ingat' follows immediately the phrase 'dua atau tiga tahun yang lalu.' It must therefore be read in that context. '… tahun yang tepat' must necessarily refer to the 'dua atau tiga tahun yang lalu'. It means he could not remember the exact year but it was two or three years earlier. It cannot also mean five years earlier. Such an interpretation is not reasonable, what more in a criminal trial. In a criminal trial even if a word or phrase or statement is open to two interpretations, the one in favour of the accused should be adopted. This is not even such a case. There is no reasonable alternative interpretation that can be given. In any event, this discussion is on the basis that the confession is admissible. Since we have held that the confession is not admissible, the confession need not be considered at all. There is no other evidence, oral or documentary, to support the 'date' of the offence.

[171] So, we have to rely on Azizan's evidence alone to prove the 'date' of the offence.

[172] The learned trial judge found Azizan a truthful, credible and reliable witness. He was even prepared to convict the appellants on Azizan's evidence alone.

[173] But, we find that Azizan's evidence, especially on the 'date' of the commission of the offence doubtful. He had given three different periods, the first two covering one month each and the last covering three months, in three different years (1992, 1993 and 1994), including one ('May 1992') when the construction of Tivoli Villa was not even ready. Besides, he also

contradicted himself on the issue whether he informed the police that he was sodomised in 1994. His demeanour even prompted the learned trial judge to record that he was 'very evasive and appears to me not to answer simple question put to him' when he was cross-examined as to the manner the police finally obtained from him the 'date' specified in the charges. On such evidence, can the court accept that the 'date' of the offence has been proved beyond reasonable doubt? In considering his evidence whether it proves the offence or not, any benefit of the doubt should be given to the appellants who are the accused.

[174] There is yet another point concerning the date of the commission of the offence. The notes of evidence on 19 August 1999 shows that when Mr Karpal Singh requested for an adjournment to enable SAC1 Musa (SP9) to carry out an investigation in respect of alibi for the period from January 1993 to March 1993, the then Attorney-General, at first had no objection. However, after the lunch break, he objected to the postponement on the ground that, at that stage, he had advised SAC 1 Musa that there was nothing more to investigate. And he said this:

> *Peguam Negara*: Saya telah memberi nasihat pada saksi ini (SAC1 Musa — added) siasatan lanjut berkaitan dengan alibi yang diberi oleh kedua-dua pihak pembela (tidak perlu (?) — added) kerana pihak pendakwa mempunyai rekod dan keterangan berkaitan dengan pergerakan (movement) Dato' Seri Anwar di dalam negara dan di luar negara dari tahun 1992 hingga September 1998 iaitu tarikh pemecatan.
>
> (Jilid 2, p 1124)

[175] The point is this. If the prosecution had such a record, which should include the night(s) the first appellant went to Tivola Villa, then the prosecution should be able to know when the first appellant visited Tivoli Villa. Instead, the prosecution had given three 'dates' as the date of the commission of the offence covering a period of three years (1992, 1993 and 1994) and the final date covers a period of three months. It only shows that even the prosecution was not sure.

[176] Furthermore, as agreed by both parties before us, the prosecution did supply the diaries of the first appellant to the defence for inspection. This happened on 21 October 1999 (Jilid 2, p 1371). However, as admitted by the prosecution, only diaries for 1994 to 1999 were made available. That is because:

> 2 Pihak kami hanya mengambil buku dairi milik Dato' Seri Anwar bin Ibrahim dari tahun 1994 hingga 1999. Dairi 1993 tidak ada dalam simpanan kami.
>
> (Jilid 5, p 2984 — letter dated (?) Jun 1999 from SAC 1 Musa in reply to SN Nair's letter dated 18 June 1999 (Jilid 5, p 2983).

[177] It must be noted that this letter was written soon after the date in the charges was amended to read 'from January until March 1993'. The statement of SAC1 Musa in his reply may be true. But, it is not free from suspicion.

[178] In the circumstances, our conclusion is that the prosecution had not proved one of the material particulars of the charge ie the 'date' of the commission of the offence.

THE BROADER QUESTION: HAS THE PROSECUTION PROVED ITS CASE BEYOND REASONABLE DOUBT?

[179] Putting aside the issue about the date for a while, we shall now consider the broader question i.e. whether the prosecution has proved the charges beyond reasonable doubt that warrants the calling for the defence.

[180] We have found Azizan to be an accomplice.

[181] Section 133 of the Evidence Act 1950 provides:

> 133 An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

[182] The illustration (b) of s 114 of the same Act however provides:

> The court may presume —
>
> (a) …
>
> (b) That an accomplice is unworthy of credit unless he is corroborated in material particulars.

[183] In *Madam Guru & Another v Emperor* (1923) Vol 24 Cr LJ 723, it was held that:

> Under s 133 of the Evidence Act the evidence of an accomplice by itself would be sufficient for the purpose of conviction; but it is a rule of practice founded on experience that in every case where an accomplice has given evidence the court must raise a presumption that he is unworthy of credit unless corroborated in material particulars. Failure to raise that presumption is an error of law.

[184] In *Yap Ee Kong & Anor v Public Prosecutor* [1981] 1 MLJ 144 (FC), Raja Azlan Shah CJ (Malaya) (as he then was) had this to say:

> It is trite law that although an accomplice is a competent witness a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. All leading authorities have stated in clear terms that it has long been a rule of practice or rule of prudence which has become virtually equivalent to a rule of law for the judge or jury to be warned of the danger of convicting on the uncorroborated testimony of an accomplice. It is a matter of prudence except where circumstances make it safe to dispense with that there must be corroboration of the evidence of an accomplice.

[185] Regarding the 'nature and extent of corroboration', his Lordship then said:

> The rules are lucidly expounded by Lord Reading in *Baskerville*'s case, *supra*. The rules may be formulated as follows:
>
> (1) There should be some independent confirmation tending to connect the accused with the offence although it is not necessary that there should be independent confirmation of every material circumstance;
>
> (2) The independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice; and

(3) The corroboration must come from independent sources, thus bringing out the rule that ordinarily the testimony of an accomplice would not be sufficient to corroborate that of another.

[186] On the same point, the Privy Council, in *Dowse v Attorney-General, Federation of Malaya* [1961] 27 MLJ 249 held:

(2) evidence, to be corroborative, must be truly probative of the relevant issue; that is, it must positively implicate the accused person and positively show or tend to show the truth of the accomplice's story that the accused committed the offence. A fact which is indifferently consistent with the accomplice's story and the accused's denial of it is neutral and supplies no corroboration.

[187] On the issue whether corroboration is at all necessary where the evidence of the accomplice is itself 'uninspiring and unacceptable', the then Chief Justice (Malaya) applied the principles enunciated by Lord Morris of Borth-y-Gest in *Director of Public Prosecutions v Hester* [1973] AC 296 at p 315:

The essence of corroborative evidence is that one creditworthy witness confirms what another creditworthy witness has said … . The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible: and corroborative evidence will only fill its role if it itself is completely credible evidence.

[188] His Lordship then went on to say:

Accordingly the court should first evaluate the evidence of an accomplice and if the same is found uninspiring and unacceptable then corroboration would be futile and unnecessary.

[189] The *dictum* of Lord Hailsham in *Director of Public Prosecution v Kilbourne* [1973] 1 All ER 440 at p 452 quoted by the learned trial judge at [2001] 3 MLJ at p 268 is also to the same effect.

[190] We do not go so far as to say that Azizan's evidence is 'uninspiring and unacceptable' or that all his evidence is not credible. All that we say is that some parts of his evidence are rather doubtful or are inconsistent. So, we would still look for corroborative evidence.

[191] Is there such corroborative evidence? Tun Haniff Omar's evidence, for example, regarding the conduct of the first appellant when told to stop his wayward activities i.e. he did not protest, at the most, only supports the first appellant's homosexual activities, not the specific charge.

[192] Likewise, Dr Mohd Fadzil's (SP2's) evidence. Even though the learned trial judge ruled that his evidence was relevant he did not find that Dr Mohd Fadzil's evidence corroborated Azizan's evidence. The Court of Appeal agreed with the learned trial judge's view. We agree with the views of both the courts.

[193] Regarding the conduct of the first appellant, two incidents were considered by the learned trial judge. The first is where the first appellant asked Azizan to deny his statutory declaration which was sent to the then Prime Minister. Secondly, where he asked SAC1 Musa to close the investigation into the allegation made against him in Police Report No 2706/97.

[194] On the first, this is what the learned trial judge said:

> In the 'Pengakuan Bersumpah' Azizan said that the act of sodomy took place 'sekitar tahun 1992'. By this it is clear that it is not confined to just acts of sodomy committed in 1992. It could include acts committed in 1991 or 1993. This view is supported by what Azizan said in cross examination that he did tell Ummi Hafilda who drafted P5 some of the places only and the date ie 'sekitar tahun 1992' where the acts took place. He did not tell Ummi all the places but this does not necessarily mean that the acts did not take place elsewhere. Therefore when Azizan signed P5 he also had in mind the incident at Tivoli Villa. Thus when Dato' Seri Anwar asked Azizan to deny P5 to the police, the accused is specifically also referring to the Tivoli incident. In my view, this amounts to Dato' Seri Anwar asking Azizan to lie, as stated by Azizan in his evidence, about the acts of sodomy which would include the Tivoli incident. This amounts to suborning of false evidence and is evidence of conduct against the accused under s 8 of the Act. I shall deal with the application of this section later. (Page 271 of [2001] 3 MLJ)

[195] We note that towards the tail-end of his evidence, in re-examination by the prosecution, Azizan had expanded the words 'sekitar tahun 1992' in his statutory declaration to include 'early 1993'. Now the learned trial judge has expanded it further to include both 1991 and 1993 as well. He did so to impute that Azizan, when signing exh P5 also had in mind the incident at Tivoli Villa despite the fact that it was not even a luxurious hotel as those named therein. With respect, in a criminal trial, such an interpretation should not be given. By doing so, the learned trial judge was not only not giving an interpretation which was more favourable to the appellant, but was actually expanding the evidence to connect exh P5 with the offences for which the appellants are charged and to hold that the conduct of the first appellant in asking Azizan to deny the contents of xh P5 is corroborative evidence.

[196] The second conduct is in respect of the first appellant's request to SAC1 Musa to close the investigation into the alleged sexual misconduct against the first appellant in 1997 based on a police report lodged by ASP Zull Aznam in connection with an anonymous letter entitled '*Talqin Untuk Anwar Ibrahim*'. The learned trial judge held that that act amounts to asking SAC1 Musa to destroy evidence 'relevant to help the court to come to a finding of fact whether there was indeed fabrication of evidence in respect of sodomy alleged to be committed by Dato' Seri Anwar Ibrahim'. He then concluded:

> For the above reasons and in the circumstances I find that the conduct of Dato' Seri Anwar as described referred to above is relevant and admissible and to that extend (*sic*) enhances the credibility of Azizan and corroborates his evidence on the allegation of sodomy committed against him. (Page 273 of [2001] 3 MLJ)

[197] The Court of Appeal, without saying much, agreed with him 'although such evidence could not be said to be directly in relation to the offence as per charge.' So, even if we agree with the Court of Appeal, it does not help.

[198] So, we find no corroborative evidence of the nature and extent described in the cases cited above, nor 'of a convincing cogent and irresistible character' — see *Jegathesan v Public Prosecutor* [1980] 1 MLJ 165.

[199] In the circumstances, is it safe to convict the appellant on Azizan's evidence alone? No doubt Azizan has been consistent in admitting the incident at Tivoli Villa despite the shame that would have been caused to him by

such admission though made years later, but we are doubtful as to when it happened and his purported role as the innocent victim therein. As such we are really in no position to say that his story is unusually convincing nor can we find any reason to give it special weight that warrants a conviction to be recorded on his evidence alone. We do not think it is safe to convict on his evidence alone.

[200] Furthermore, the offence is a sexual offence. Even though a conviction founded on the uncorroborative evidence of the complainant is not illegal provided that the presiding judge warns himself of the danger of convicting on such uncorroborated evidence (see *Chin Nam Hong v PP* [1965] MLJ 40, it is unsafe to convict on an uncorroborated testimony of the person on whom the offence is said to have been committed unless for any special reason that testimony is of special weight — see *Ganpart v Emperor* AIR 1918 Lab 322 and *Bal Mukundo Singh v Emperor* (1937) 38 Cr LJ 70 (Cal).

[201] In this respect, our discussion and conclusion regarding corroborative evidence in support of the evidence of an accomplice and in respect of Azizan's evidence is applicable. On this ground too it is unsafe to convict the appellants on Azizan's uncorroborated evidence alone.

[202] To summarise our judgment, even though reading the appeal record, we find evidence to confirm that the appellants were involved in homosexual activities and we are more inclined to believe that the alleged incident at Tivoli Villa did happen, sometime, this court, as a court of law, may only convict the appellants if the prosecution has successfully proved the alleged offences as stated in the charges, beyond reasonable doubt, on admissible evidence and in accordance with established principles of law. We may be convinced in our minds of the guilt or innocence of the appellants but our decision must only be based on the evidence adduced and nothing else. In this case Azizan's evidence on the 'date' of the incident is doubtful as he had given three different 'dates' in three different years, the first two covering a period of one month each and the last covering a period of three months. He being the only source for the 'date', his inconsistency, contradiction and demeanour when giving evidence on the issue does not make him a reliable source, as such, an essential part of the offence has not been proved by the prosecution. We also find the second appellant's confession not admissible as it appears not to have been made voluntarily. Even if admissible the confession would not support the 'date' of the commission of the offences charged. We have also found Azizan to be an accomplice. Therefore corroborative evidence of a convincing, cogent and irresistible character is required. While the testimonies of Dr Mohd Fadzil and Tun Haniff and the conduct of the first appellant confirm the appellants' involvement in homosexual activities, such evidence does not corroborate Azizan's story that he was sodomised by both the appellants at the place, time and date specified in the charge. In the absence of any corroborative evidence it is unsafe to convict the appellants on the evidence of an accomplice alone unless his evidence is unusually convincing or for some reason is of special weight which we find it is not. Furthermore, the offence being a sexual offence, in the circumstances that we have mentioned, it is also unsafe to convict on the evidence of Azizan alone.

[203] For all the above reasons, we are not prepared to uphold the conviction. Since the applicable law in this case requires that the prosecution must prove its case beyond reasonable doubt before the defence may be called, the burden being the same as is required to convict the appellants at the end of the case for the defence, we are of the view that the High Court has misdirected itself in calling for the appellants to enter their defence. They should have been acquitted at the end of the case for the prosecution.

[204] We therefore allow the appeals of both appellants and set aside the convictions and sentences.

[205] We must record our appreciation for the meticulous recording of the notes of evidence by the learned trial judge, without which we would not be able to scrutinise the evidence, the submissions and the grounds for every ruling and decision that he had made in the preparation of this judgment.

Rahmah Hussain FCJ (delivering dissenting judgment):

[206] On 20 May 2004, at the conclusion of submissions by both learned counsel for the appellants as well as the learned Attorney-General for the respondent, we reserved our judgment. This is now my judgment.

[207] Both the appellants had appealed against their convictions and sentences to the Court of Appeal. In the first appeal the first appellant appealed against his conviction and sentence on a charge preferred against him for an offence punishable under s 377B of the Penal Code. On conviction he was sentenced to nine years' imprisonment to commence after he had served his first sentence in respect of his conviction under the first trial.

[208] In the second appeal the second appellant appealed against the conviction and sentence on two charges preferred against him. The first charge was for an offence punishable under s 109 read with s 377B while the second charge was for an offence punishable under s 377B. He has been sentenced to six years' imprisonment with two strokes of the rotan for the first charge and to six years' imprisonment and two strokes of the rotan for the second charge. The imprisonment terms are to run concurrently.

[209] Their appeals were dismissed by the Court of Appeal. Hence this appeal.

[210] For the purpose of this judgment, I shall first consider the four main issues raised by the defence namely:

(1) the credibility of Azizan bin Abu Bakar;

(2) Azizan being an accomplice;

(3) corroboration of Azizan; and

(4) voluntariness of the confession of Sukma — the second appellant.

A) THE CREDIBILITY OF AZIZAN BIN ABU BAKAR

[211] As I see it the credibility of Azizan is of paramount consideration, as there can be no dispute that the entire prosecution case hinges on his evidence.

[212] It is contended by the appellants that Azizan is not a credible witness for the following reasons:

(i) the dates in the charges were suggested/given by the police and not by Azizan;

(ii) Azizan despite being sodomised went back to work for first appellant's wife;

(iii) in the earlier trial, Azizan denied being sodomised by the first appellant;

(iv) Azizan's credit should have been impeached;

(v) Azizan is totally unreliable and inconsistent in that the trial judge commented upon him/his evidence;

(vi) Azizan said he brought these allegations in the open 'demi maruah dan agama' but he himself was convicted of khalwat; and

(vii) Azizan was bribed.

[213] The law relating to the assessment of the credibility of witnesses is well established. As Lord Bridge of Harwich said in *Attorney-General of Hong Kong v Wong Muk Ping* [1987] AC 501 at p 510:

> It is a common place of judicial experience that a witness who makes a poor impression in the witness box may be found at the end of the day, when his evidence is considered in the light of all the other evidence bearing upon the issue, to have been both truthful and accurate. Conversely, the evidence of a witness who first seemed impressive and reliable may at the end of the day have to be rejected. Such experience suggests that *it is dangerous to assess the credibility of evidence given by any witness in isolation from other evidence in the case which is capable of throwing light on its reliability* … . (Emphasis added.)

[214] In *Bhojraj v Sitaram* AIR 1936 PC 60 the Privy Council said that the real test for either accepting or rejecting the evidence of a witness is how consistent the story is with itself, how it stands the test of cross-examination, and how far it fits in with the rest of the evidence and the circumstances of the case. The case of *Mohd Ali bin Burut & Ors v Public Prosecutor* [1995] 2 AC 579 supports the proposition that it is important to bear in mind that in deciding on the guilt or otherwise, a trial court will not usually compartmentalize the evidence. It will make its finding of credibility and reliability in respect of a particular witness against the possibilities, probabilities and certainties emerging from the whole body of the evidence before it.

[215] Furthermore it is trite that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons not to believe him. In *Public Prosecutor v Mohamed Ali* [1962] MLJ 257, (at p 258) Thomson CJ said this:

> When a police witness says something that is not inherently improbable his evidence must in the first instance be accepted.

[216] And in *Balasingham v Public Prosecutor* [1959] MLJ 193 (at p 194) Ismail Khan J (as he then was) stated:

> After all there is no legal presumption that an interested witness should not be believed. He is entitled to credence until cogent reasons for disbelief can be advanced in the light of evidence to the contrary and the surrounding circumstances.

[217] So what happens when there are discrepancies or contradictions in a witness' testimony? Would that make him less than credible and lead to an outright rejection of his entire testimony? In *Chean Siong Guat v Public Prosecutor* [1969] 2 MLJ 63 (at pp 63 and 64) Abdul Hamid J (as he then was) had this to say:

> Discrepancies may, in my view, be found in any case for the simple reason that no two persons can describe the same thing in exactly the same way. Sometimes what may appear to be discrepancies are in reality different ways of describing the same thing, or it may happen that the witnesses who are describing the same thing might have seen it in different ways and at different times and that is how discrepancies are likely to arise. These discrepancies may either be minor or serious discrepancies.
>
> Absolute truth is I think beyond human perception and conflicting versions of an incident, even by honest and disinterested witnesses, is a common experience. In weighing the testimony of witnesses, human fallibility in observation, retention and recollection are often recognized by the court. Being a question of fact, what a magistrate need do is to consider the discrepancies and say whether they are minor or serious discrepancies. If, after con-them. On the other hand, if a magistrate finds that the discrepancies do not detract from the value of the testimony of the witness or witnesses, it would then be proper for him to regard the discrepancies as trivial and ignore them. On the other hand, if a magistrate finds that the discrepancies relate to a material point which would seriously affect the value of the testimony of the witness or witnesses, then it would be his duty to weigh the evidence carefully in arriving at the truth.

[218] And in *Pie bin Chin v Public Prosecutor* [1985] 1 MLJ 234 (at pp 235 and 236), Wan Yahya J (as he then was) said:

> Discrepancies are no doubt present in this case, as they do ostensibly appear in most cases in evidence of witnesses for the prosecution as well as the defence. The transcripts of most evidence, when thoroughly tooth-combed by any able lawyer, never failed to yield some form of inconsistencies, discrepancies or contradictions but these do not necessarily render the witness's entire evidence incredible. It is only when a witness's evidence on material and obvious matters in the case is so irreconcilable, ambivalent or negational that his whole evidence is to be disregarded.
>
> Forgetfulness and failure to recall exactly certain events, which did not seem to be important to the witness, do not necessarily shake his credibility or render other parts of his story unworthy of belief. Various persons are endowed with varying powers of cognition, attentiveness and perception, so that it is not uncommon for two witnesses to a common event to describe it in slightly differing versions.

[219] Thus, the fact that there are discrepancies in a witness' testimony does not straight away make him (in this case Azizan) an unreliable witness and make the whole of his evidence unacceptable.

[220] Having laid down the legal principles with regard to credibility and how discrepancies on a witness are to be treated in assessing credibility, let us now look at what the learned trial judge had to say on the credibility of Azizan because of the latter's inconsistent statements as to the date of the commission of the offence. At p 255 (para C) of his judgment, *Public Prosecutor v Dato' Seri Anwar bin Ibrahim & Anor* [2001] 3 MLJ 193, he said:

> In his testimony Azizan said he was confused because he was asked about the months of May 1994 and May 1992 repeatedly as stated above. I find as a fact that

he was confused. When a witness is confused, it does not mean he was lying. The naked truth is that he could not remember what he had said. I am satisfied he was not lying. In any event, the issue whether he told the police he was sodomized in May 1994 and May 1992 are not the issues in the current charges against both the accused. The issue is whether he was sodomized by both the accused between the months of January and March 1993 at Tivoli Villa. I therefore rule the credit of Azizan is not affected on this score.

[221] Then, after considering the evidence of Azizan as to the date of the offence in relation to the evidence of the Investigation Officer — SAC1 Musa, the learned trial judge said (at p 255 para I to p 256 para A):

Be that as it may, the evidence of SAC1 Musa clearly states that Azizan was consistent in his statements on the issue of sodomy although he was not sure of the exact dates. The relevant dates we are concerned with in the present charges are between the months of January and March 1993. Azizan emphatically said in evidence that he was sodomized by both Dato' Seri Anwar and Sukma at Tivoli Villa between these dates and he gave the reasons for remembering the dates. This evidence was not successfully challenged. It is therefore established on this evidence that Azizan was sodomized by both Dato' Seri Anwar and Sukma in Tivoli Villa between January to March 1993. Whether he was sodomized in May 1994 or May 1992 is not relevant as these dates are not in issue to be decided in this case. I see no merits on this contention and the credit of Azizan is not affected on this ground.

[222] Finally on the issue of the credibility of Azizan, the learned judge made a firm finding in relation to the ingredients of the charges against both appellants as follows (p 258, paras D–I):

… he is a wholly reliable, credible and truthful witness taking into consideration the whole of his evidence notwithstanding inconsistencies, discrepancies and contradictions which did not detract the weight and truth of his evidence in relation to the ingredients of the charges against both accused.

Azizan has truthfully and without embellishment, distortion or exaggeration in his evidence narrated in minute detail how he was sodomized by Dato' Seri Anwar and Sukma at the date and place as stated in the charges against both accused. … His description and direct experience of being sodomized completely negatives any probability that Azizan was tutored or coached as claimed by the defence counsel. No reasonable person or judge could on the evidence come to any other finding than the firm and unescapable conclusion that both accused sodomized Azizan gaily whetting their appetites at Tivoli Villa. Only persons directly and actively subjected to these acts of sodomy would be able to narrate the details of the whole episode.

I am of the firm view that Azizan was speaking the whole truth when he said in evidence that he was sodomized at Tivoli Villa between the months of January and March 1993 by both accused as stated in the charge. There is no reason why he should come out with such meticulous details describing the preliminaries sex play indulged in by Dato' Seri Anwar unless this was true. He has nothing to gain whatsoever but stood to lose everything if his evidence was not true as this would affect his self respect and his good name and standing in the eyes of the public and would also bring embarrassment to his family members. Further one cannot conceive that one would fabricate a serious charge of sodomy against the Minister of Finance and Deputy Prime Minister of Malaysia.

[223] In conclusion he said, at pp 258–259:

It cannot be denied that there are discrepancies in Azizan's testimony. I have considered these discrepancies earlier and had made my finding on them. Apart

from that, I do not find any serious discrepancies that would affect Azizan's credibility or reliability as a witness of truth on the ingredients of the charges against both the accused.

[224] The learned judges of the Court of Appeal agreed with the finding of the learned trial judge when they said (at p 214 para [106] of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2004] 1 MLJ 177):

> Surely therefore it would be wrong in law to wholesale reject the evidence of Azizan just because he faltered in few instances in the course of his testimony. Indeed discrepancies found in the testimony of a witness may be evidence of his truthfulness rather than the reverse (see also *Dato' Mokhtar bin Hashim v PP* [1983] 2 MLJ 232).

[225] As to the significance of the date in the charge, the learned trial judge stated (at p 249) as follows:

> In any event a date in the charge has never been material. In *R v Severo Dossi* (1918) 13 Cr App R 158 (quoted in *Law Kiat Lang v PP* [1966] 1 MLJ 215 and *Ho Ming Siang v PP* [1966] 1 MLJ 252) Lord Atkin J observed:
>
> > From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence.'

[226] And the judges of the Court of Appeal agreed with the trial judge by stating that 'there are authoritative decisions of our courts wherein time and date in a charge were held to be immaterial'. They then referred to the case of *Hussin bin Sillit v Public Prosecutor* [1988] 2 MLJ 232, where Mohd Azmi SCJ has this to say at p 236 (at pp 195–196 of the Court of Appeal judgment):

> It should be borne in mind that where the charge relates to only one offence, merely amending the date, place or time in the charge would not necessarily constitute amending the offence, and under s 156 of the Criminal Procedure Code, 'no error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded at any stage of the case as material unless the accused was in fact misled by such error or omission …' . Clearly, each situation must depend on the facts and circumstances of the particular case in determining whether any amendment as to time, date or place affected before or in the course of the trial entails changing the offence with which the accused is charged into an entirely different offence. There is no reason to suppose that every amendment, either before or after commencement of the trial, must necessarily change the occasion in the original charge into an entirely different occasion so as to exclude evidence pertaining to it from being 'evidence in support of a defence of alibi'.

[227] The Court of Appeal also expressed its view on the issue of the date in relation to the charges preferred against the appellants and specifically on the issue of alibi. This is what it says: (at p 199 at [2004] 1 MLJ 177)

> On the issue of the amendment to the charges in respect of the date alleged in the commission of the offences subsequent to the notice of alibi, we need only to adopt the view expressed by the majority in the Supreme Court of Canada in the case of *Regina v P* (MB) 89 CCC (3d) 289; [1994] CCC LEXIS 2454; 113 DLR (4th) 461, where Lamer CJ opined thus (at p 297):
>
> > 'The fact that an accused may have an alibi for the period (or part of the period) described in the indictment does not automatically 'freeze' the dates specified in

the indictment. That is to say, there is no vested right to a given alibi. Alibi evidence must respond to the case as presented by the Crown and not the other way around.'

[228] Now, in sexual offences, as in this case, the essential ingredients are the sexual act and the identity of the offender. Therefore, it is incorrect to say that the date is a vital ingredient of the charge. In the case of *R v Richard Beynon* [1999] EWCA Crim 1172, where the charges framed against the accused did not have the time and place but only the breath of the period when the indecent assault was alleged to have taken place, the Court of Criminal Appeal of England had this to say:

We are not saying that that is uncommon; indeed it is very common in allegations and charges of this sort.

[229] And our own Federal Court in the case of *Ku Lip See v Public Prosecutor* [1982] 1 MLJ 194, had said this (at p 196 — para I):

With reference to question (1), we are constrained to observe that although the charge has not stated exactly when the offence was committed during the months of May and June 1978 it has nevertheless specifically defined the time and place sufficiently to enable the applicant to answer the charge.

[230] Furthermore, the learned trial judge clearly said in his judgment that the evidence of Azizan that he was sodomized between the dates specified in the charge was not successfully challenged. Thus in order to reject this finding of fact by the trial judge there must be strong and compelling reason to do so. Particularly so, as this finding of fact has been accepted by the Court of Appeal.

[231] It is settled law that very rarely does a higher appellate court interfere with concurrent findings of fact by the courts below. Such view was expressed by the Privy Council in the case of *Sattar Buxoo & another v The Queen* [1988] 1 WLR 820 PC, an appeal from Mauritius, where it is said at p 824:

In the present case, however, it is plain that the circumstances of the appeal take it far outside any possible application of the principles in question. No point of law is involved. The only issue before the Intermediate Court and the Supreme Court was whether on the evidence led the defendants had been identified as being among the persons who carried out the serious assault which was undoubtedly perpetrated on the victim Fockeena. The *Intermediate Court found that they had been and the finding was upheld by the Supreme Court. The Board could never consider it right to interfere with a concurrent finding of fact of that nature*. (Emphasis added.)

[232] And nearer home, that seems to be also the approach of this court as expressed in the recent case of *Sri Kelangkota–Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 MLJ 257 at p 273 where Abdul Malek Ahmad FCJ (as he then was) said:

In our view, looking at the above cited passages from the judgment of the Court of Appeal and having regard to the fact that the issue that was decided by the Court of Appeal and the High Court was clearly one of fact, there is obviously no merit in the contention of the appellants as found in the grounds of appeal that the Court of Appeal erred in law in deciding as they did. Even assuming for a moment that the Court of Appeal erred in the application of the principles of law to the particular set of facts in the instant appeal, *there is no room for this court to reverse the concurrent finding of fact made by the High Court and the Court of Appeal that the appellants were*

the guilty party in breach of the agreements since it is trite that the appellate court is not prepared to interfere with the concurrent finding of facts made by the courts below as held by this court in *Lim Geak Liang v East West UMI Insurance Bhd* [1997] 3 MLJ 517 at p 523. (Emphasis added.)

[233] To sum up, in view of the abovesaid reasons and the authorities referred to earlier, I find myself reluctant to interfere with the finding of fact by both the courts below regarding the credibility of Azizan.

B) AZIZAN BEING AN ACCOMPLICE

[234] Section 133 of the Evidence Act 1950, clearly provides that:

An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

[235] To my mind the learned trial judge has dealt with the issue of accomplice correctly and quite admirably when he said (at pp 249–250 at [2001] 3 MLJ 193):

An accomplice is defined in Wharton's *Law Lexicon* as 'a guilty associate in crime'. In *Regina v Mullins* 3 Cox CC 526, Maule J described an accomplice as a person who has concurred 'fully in the criminal designs of another for a certain time, until getting alarmed or for some other cause, they turned upon their former associates and gave information against them. These persons may be truly called accomplice'.

When the issue whether a witness is an accomplice is raised 'the court must study the evidence and make the necessary finding. There can be no rule of law or evidence that a witness is automatically an accomplice just because of his actus reus. The whole idea is completely contrary to the basic concept of criminal liability' — per Salleh Abas CJ (Malaya) (as he then was) in *Ng Kok Lian & Anor v PP* [1983] 2 MLJ 379. In deciding whether a witness is an accomplice the court has therefore to consider the evidence that is before it. Bearing in mind this principle can it be said that Azizan is an accomplice? Does the evidence show that Azizan is an accomplice? In his evidence he said in cross examination that he told the police he was sodomized between the months of January and March 1993 although he cannot remember the exact date on which the sodomy took place. It was contended by the prosecution that Azizan was not an accomplice because he was sodomized without his consent. He was under fear, he was scared of both the accused and was not a willing participant in the offence but a victim of it. The prosecution referred to *Srinivas Mall Bairoliya v Emperor* AIR 1947 PC 135 in support of its contention. With the greatest respect I do not agree with this submission. The case of *Srinivas* is not an authority for the proposition that a witness is not an accomplice just because there is no consent on his part in the commission of the act that forms the subject matter of the charge against the accused. The case laid down the principle that when an accomplice acts under a form of pressure which it would require some firmness to resist reliance can be placed on his uncorroborated evidence. In the instant case the evidence shows that Azizan was invited to visit Tivoli Villa by Sukma. Azizan went there to see Sukma's new apartment. He went there not with the intention of committing sodomy with both the accused. His actus reus alone is not sufficient to make him an accomplice, there must also be the intention on his part (see *Ng Kok Lian*'s case). For the reasons I therefore find that Azizan is not an accomplice.

[236] Incidentally, it is a finding of fact by the learned trial judge that Azizan is not an accomplice which an appellate court should not or should be very slow to interfere. In any event I find no reason to disagree with the reasoning

of the trial judge in coming to his conclusion as he did. There was no evidence adduced that Azizan planned or agreed to any plan for him to come to the apartment to be sodomized or to participate in such activity that night. There was nothing to suggest that Azizan 'concurred "fully in the criminal designs of another for a certain time, until getting alarmed or for some other cause, they turned upon their former associates and gave information against them" '. He gave his reason why he was at the apartment and it was unchallenged by the defence. The assertion that he remained in a position even after the first Appellant had sodomized him thereby enabling the Second appellant to sodomize him as well, should not be taken as a piece of evidence that would make him an accomplice of the first order. To do so may set an undesirable precedent whereby even a victim of a gang rape would be classified as an accomplice for similar reason. Indeed the law is clear that:

> 'The court must therefore approach his evidence in the same way and not come to automatic conclusion as in *Haji Ismail*'s case (*Public Prosecutor v Haji Ismail & Anor* [1940] MLJ 76) that he is an accomplice just because counsel said so. There can be no automatic application of the rule as the accomplice's evidence to any witness nor could a witness be prima facie an accomplice without first examining his evidence to find out whether he is an accomplice or not; …
>
> Thus in every case when the issue is raised that a witness is an accomplice the court must study the evidence and make the necessary finding. There can be no rule of law or evidence that a witness is automatically an accomplice just because of his actus reus. The whole idea is completely contrary to the basic concept of criminal liability'

per Salleh Abas CJ (Malaya) (as he then was) in *Ng Kok Lian & Anor v Public Prosecutor* [1983] 2 MLJ 379 at p 382.

[237] Furthermore, the fact that Azizan did not run away upon seeing the first appellant in the apartment that night should not cloak him as an accomplice. He gave his reason for not being able to get off the clutches of the first appellant. And his action should be judged under the circumstances he was in, vis-à-vis the first appellant. Azizan was a mere driver of the second most powerful man in the nation at that time who had all the state apparatus at his disposal.

[238] The fact that Azizan did not even dare to lodge a police report on the incidents should illustrate the predicament that he was in. He also executed P5 and sought the advice of a very senior counsel in the person of Mr. Karpal Singh. It may be easy for anyone to sit in a judgment seat to advise on what he should have done. But the man said that he was ashamed of what had happened and was gravely in doubt if anyone would believe him at that time let alone the Police force. In fact his apprehension was not without any basis since it was not in dispute that initially he went through the anguish of being questioned and investigated by the Police when the sordid story focusing on the first appellant began to emerge. Indeed it is no longer an issue that he was coerced to retract his allegation as revealed in P5. Accordingly to brand Azizan as an accomplice without considering the aforesaid reasons would tantamount to castigating a rape victim for being in the wrong place at the wrong time. To my mind such a draconian view would amount to a grave injustice to an innocent victim of sexual assaults.

[239] Finally even assuming that the learned trial judge might have been wrong in not finding Azizan as an accomplice, he did not however close his mind to the issues of corroboration of the need to warn himself of the danger of convicting a person on uncorroborated evidence particularly in sexual offence cases. In short, though he ruled that Azizan was not an accomplice, he also considered, albeit indirectly, the alternative probability of Azizan being one and thus proceeded to identify and analyse the evidence that could be corroborative in nature and came to his findings. I will deal with this point in greater detail later in this judgment.

c) Corroboration of Azizan

[240] I am very well aware of s 114(b) of the Evidence Act 1950 which provides:

> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> ILLUSTRATIONS
>
> The court may presume —
>
> (a) …
>
> (b) that an accomplice is unworthy of credit unless he is corroborated in material particulars;

[241] But such presumption should not arise in this case in view of the finding of the learned trial judge that Azizan is not an accomplice. This is what the learned trial judge said (at p 266 para H):

> Before considering whether there is a need for corroboration and whether there is in fact corroboration in this case, I propose to state briefly the law on this subject. The word corroboration had no special technical meaning; by itself it meant no more than evidence tending to confirm other evidence (see *Director of Public Prosecutions v Kilbourne* [1973] 1 All ER 440). It has also been said that what is required is some additional evidence rendering it probable that the story of the complainant is true and that it is reasonably safe for the court to act upon the evidence. In the celebrated case of *R v Baskerville* [1916] 2 KB 658 at p 667 Viscount Reading LCJ said:
>
> 'We hold that the evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. Inother words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.'
>
> It has also been held that corroborative evidence is not necessarily restricted to the oral evidence of an independent witness. Corroboration can equally be well afforded by established facts and the logic of established facts sometimes speaks even more eloquently than words (see *Brabakaran v PP* [1966] 1 MLJ 64).
>
> I shall now deal with the question whether corroboration is required. It was contended by the defence that Azizan, a victim of the alleged sodomy, committed by both the accused is an accomplice and therefore his evidence needs to be corroborated. I have earlier in this judgment dealt with the question of an accomplice and the need for corroboration in respect of the evidence of an accomplice and made a ruling that Azizan is not an accomplice. Nevertheless in a case of this nature which is

a sexual offence corroboration of Azizan's evidence is desirable though not technically essential and the court should give sufficient attention to the matter (see *Koh Eng Soon v Rex* [1950] MLJ 52).

In *PP v Mardai* [1950] MLJ 33 the accused was charged for an offence of outraging the modesty of a woman under s 354 of the Penal Code. On the issue of the need for corroboration of the complainant's evidence Spenser-Wilkinson J had this to say at p 33:

> "Whilst there is no rule of law in this country that in sexual offences the evidence of the complainant must be corroborated; nevertheless it appears to me, as a matter of common sense, to be unsafe to convict in cases of this kind unless either the evidence of the complainant is unusually convincing or there is some corroboration of the complainant's story."

An allegation of sodomy can be easily made but very difficult to refute and the evidence in support of such a charge has to be very convincing in order to convict the accused. In *Emperor v Sari Das* AIR 1926 Lah 375 it was said:

> 'A charge under s 377 is one very easy to bring and very difficult to refute. Therefore the evidence in support of such a charge has to be very convincing.'

The evidence in support of such a charge must also be corroborated. It is said that 'it is unsafe to convict on the uncorroborated testimony of the person on whom the offence is said to have been committed unless for any reason that testimony is of special weight — see *Ganpart v Emperor* AIR 1918 Lah 322. See also *Bal Mukundo Singh v Emperor* (1937) 38 Cr LJ 70 (Cal).

It is therefore trite law that a complainant's evidence in a sexual offence requires corroboration although a conviction founded on the uncorroborated evidence of the complainant is not illegal provided that the presiding judge must warn himself of the danger of convicting on such uncorroborated evidence (see *Chiu Nang Hong v PP* [1965] 31 MLJ 40).

[242] I find no flaw in the exposition of the law. The remaining issue is on the application of the law to the evidence adduced.

[243] The learned trial judge went through each of the probable corroborative evidence and made his conclusions. The testimonies of Dr Mohd Fadzil bin Man ('SP2') and Tun Haniff bin Omar ('SP3') were both rejected as corroborative evidence. However, he found not only relevant and admissible but also corroborative evidence to the assertion of Azizan in respect of the conduct of the first appellant in first asking Azizan to retract the content of P5 and subsequently asking SAC1 Musa to cease investigation in relation to the police report 2706/97. And as was rightly found by the learned trial judge this aspect of the testimonies of Azizan and SAC1 Musa were not disputed or challenged by the defence.

[244] The other corroborative evidence found by the trial judge is the confession of the second appellant which will be dealt with in greater detail, later on. Suffice it for me to say at this stage, that I have considered the reasoning of the learned trial judge and I agree with him. I also find as a correct restatement of the law when the Court of Appeal in response to the contention that a retracted confession has no longer any corroborative value, said:

> ... In the case of *Tinit & Ors v Public Prosecutor (No.2)* [1964] MLJ 389 McGilligan J was of the opinion that retracted confessions *'once found to have been voluntarily made — were very good corroboration'*. That in our view makes sense for it is settled law that a confession on its own, even if subsequently retracted so long as the court is satisfied of its voluntariness and truth, can be a basis to convict an accused person (See *Osman & Anor v Public Prosecutor* [1967] 1 MLJ 137 FC; [1968] 2 MLJ 137 PC; *Yap Sow Keong & Anor v Public Prosecutor* [1947] MLJ 90; *Dato' Mokhtar bin Hashim v PP*. There is therefore is no reason why it cannot be good corroborative evidence.

[245] The learned trial judge was also very careful in his approach when he said this at p 274:

> Assuming that I am wrong that there was corroboration, I had in my mind the risk of convicting an accused on uncorroborated evidence. I warned myself of the dangers of convicting both accused on the sodomy charges on uncorroborated evidence of Azizan but nevertheless in this case, I am satisfied and convinced that the charges of sodomy against both accused have been proved beyond a reasonable doubt even though there was no corroboration. This principle had been laid down in *Chiu Nang Hong v PP*.

[246] Hence, in coming to his finding I find that the learned trial judge did not merely go into the pretext of complying with the law. Although he found Azizan not an accomplice he nevertheless dealt with the evidence on corroboration in view of the nature of the charges preferred against the appellants. And in so doing he examined all the purported corroborative evidence in details and rejected those that did not satisfy the requirements of the law.

D) VOLUNTARINESS/ADMISSIBILITY OF THE CONFESSION OF SUKMA — THE SECOND APPELLANT

[247] The classic test for the admissibility of a confession is part objective and part subjective (see : *Director of Public Prosecutor v Ping Lin* [1976] AC 574; *Dato Mokhtar bin Hashim v Public Prosector* [1983] 2 MLJ 232). As Yong Pung How CJ said in *Sharom bin Ahmad & Anor v Public Prosecutor* [2000] 3 SLR 565 at p 586:

> The question of whether a statement is voluntarily made is essentially a question of fact and the test of voluntariness is both objective and subjective. The query of whether there is an inducement, threat or promise is objectively determined while the question of whether such inducement, threat or promise has operated on the mind of the accused must be subjectively answered from the perspective of the particular accused.

[248] In dealing with the subjective nature of the test Sharma J said in *Public Prosecutor v Law Say Seck & Ors* [1971] 1 MLJ 199 at p 200 (para A):

> It is left to the court entirely to form its own opinion as to whether an inducement, threat or promise held out in any particular case was sufficient to lead the person to suppose that he would gain an advantage of a temporal nature. In doing so the mind of the person making the statement has to be judged rather than that of the person in authority. In scrutinizing a case of this kind the court has to perform a three-fold function: it has to determine the sufficiency of inducement, threat or promise; it has to clothe itself with the mentality of the accused to see whether the grounds would appear to the accused reasonable for a supposition mentioned in s 24

of the Evidence Ordinance; lastly it has to judge as a court if the confession appears to have been caused in consequence of any inducement, threat or promise.

[249] Therefore the threat, inducement or promise must have 'caused' a person to make a confession. As Augustine Paul J (as he then was) said in *Aziz bin Muhammad Din v Public Prosecutor* [1996] 5 MLJ 473 at p 501, (para C)

> It is therefore clear that the inducement, threat or promise must have 'caused' the person to make the statement. In the Indian Supreme Court case of *Pyare Lal v State of Rajasthan* AIR 1963 SC 1094 Subba Rao J said that to determine involuntariness the mere existence of the threat, inducement or promise is not enough. As Sharma J said in *Public Prosecutor v Law Say Seck & Ors.* [1971] 1 MLJ 199 one should be able to say that without it the person would not have made a statement. It follows that an inducement, threat or promise per se is insufficient to render the confession inadmissible.

[250] Thus cases such as *Wong Kam-Ming v R* [1979] 1 All ER 939 and *R v Brophy* [1981] 2 All ER 705, have ruled that in order to effectively challenge a confession a person is practically obliged to give evidence. He must give evidence to show how the threat, inducement or promise 'caused' him to make the confession as their mere existence is not sufficient to make the confession involuntary.

[251] In the present case, the learned trial judge had considered each and every allegation raised by Sukma and the denial by the police officers. He then concluded that he believed the police officers. He also made a ruling that the confession was voluntarily made. He said (at p 261 paras G–H of his judgment — [2001] 3 MLJ 193):

> It remains to be considered whether it is true and trustworthy. It is to be borne in mind that if a confession is found to be voluntary, the court must before acting upon it be satisfied what is stated therein is true and reliable. In judging the truth and reliability of the confession, the court should carefully examine the confession and compare it with the rest of the evidence in the light of the surrounding circumstances and probabilities of the case (see *Shankar v State of Rajasthan* AIR 1978 SC 1248).

[252] At the end of it all, this is what the learned trial judge had to say (atp263 para E):

> To summarize it is my finding that, based on the evidence of Azizan and in the circumstances, what Sukma stated in the confession that he and Dato' Seri Anwar sodomized Azizan as stated in the charge is true.

[253] The Court of Appeal in agreeing with the learned trial judge's finding said (at p 106 — para [122]):

> And as for the confession of Sukma (P4) we also agree with the learned trial judge that after finding the confession as having being made voluntarily and admitted in evidence the same should have corroborative effective on the evidence of Azizan.

[254] So, has the prosecution proved its case beyond a reasonable doubt at the end of its case? As regards the approach and function of an appellate court on an appeal that point has been succinctly expressed by the Court of Appeal. And as stated earlier, I fully agree with the statement of the principle thereof. The trial judge and the Court of Appeal have also in their respective judgments correctly identified the ingredients of the offences in the charges preferred

against the appellants that need to be proved by the Prosecution in order to secure a conviction. Now to recapitulate and further to what I have expressed above, the evidence adduced for the Prosecution may be shortly listed thus:

i) The testimony of Azizan being the main and critical piece of evidence.

[255] In my view the testimony of Azizan as a whole remained intact and credible notwithstanding the criticisms lodged by learned counsel for the Appellants. Indeed the trial judge was convinced and I do not find any ground to disagree with him for the reasons given hereinabove, that he could rely on Azizan's evidence alone. This is what he said at p 259:

> Bearing in mind the above principles and taking into account the credible manner in which he gave evidence, his demeanour while giving evidence and his unchallenged and unshaken evidence or the details of sodomy committed at Tivoli Villa which is consistent with itself and the other evidence adduced by the prosecution, I have no hesitation in coming to the conclusion and a finding that Azizan's evidence is wholly credible on all the facts relating to the act of sodomy committed on him by both the accused.

ii) The admissible confession of Sukma, the second appellant

[256] And as stated earlier, I find no good reason to disagree with the concurrent finding of the trial judge and that of the Court of Appeal. As observed by the trial judge the details in the confession render an inevitable conclusion that it must have been given voluntarily. At any rate the trial judge whilst accepting the deficiencies in the evidence of Azizan and of the other evidence adduced by the Prosecution in particular that of the confession of Sukma; he was in no doubt prepared to call for the defence. This is what he said at pp 264–265:

> It is now timely for me to consider the other evidence adduced by the prosecution against Dato' Seri Anwar, a co-accused before taking into consideration the confession (P4) as against him. Apart from the confession there is the evidence of Azizan who testified that he was sodomised by Dato' Seri Anwar at Sukma's apartment at Tivoli Villa at about 7.30 pm. between January and March 1993 as stated in the charge against him. The evidence was not successfully challenged by the defence, though an attempt was made to challenge it. I accepted his evidence for the reasons which I had stated when I dealt with the issue of Azizan's credibility in the earlier part of this judgment and made a ruling that Azizan is a reliable and truthful witness. His evidence is wholly reliable and capable of belief, which I accept. It is indeed a very strong piece of independent evidence to prove that Dato' Seri Anwar committed sodomy on Azizan as stated in the charge against him. I am prepared to act on this evidence alone independently, disregarding and ignoring the confession on the principle as laid down in *Herchun Singh*'s case (*Herchun Singh & Ors v PP* [1969] 2 MLJ 209). It is therefore not necessary for me to call the confession in aid.

[257] I am inclined to accept the above reasoning of the trial judge. It will be too high a standard to require that in sexual offences of a nature as in the instant appeals no case can be made out if it is solely on the evidence of a complainant or a participant to the act. At the end of the day it is the credibility of the witness that matters and in these appeals the trial judge has correctly appreciated the position.

iii) The corroborative evidence in relation to the evidence adduced

[258] The other aspect of the complaint of the appellants is on the issue of corroboration or the lack of it in relation to the evidence of Azizan. With respect, I am of the view that the trial judge has addressed the issue extensively and correctly. He identified the respective evidence which corroborated the evidence of Azizan. I have no reason to disagree with his analysis and the conclusion he arrived at. Further the trial judge went on to warn himself of the danger of convicting an accused on uncorroborated evidence especially in sexual offence. This is what he said (at p 274 [2001] 3 MLJ 193):

> Assuming that I am wrong that there was corroboration, I had in my mind the risk of convicting an accused on uncorroborated evidence. I warned myself of the dangers of convicting both accused of the sodomy charges on uncorroborated evidence of Azizan but nevertheless in this case, I am satisfied and convinced that the charges of sodomy against both accused have been proved beyond a reasonable doubt even though there was no corroboration. This principle had been laid down in *Chiu Nang Hong v PP*.

[259] Specifically on the charge for abetment against the second appellant I am unable to fault the trial judge in his analysis of the evidence and conclusion, which is as follows at p 283:

> The result is that I find as a fact that the prosecution has proved beyond a reasonable doubt that in fact and in law Sukma abetted Dato' Seri Anwar in the commission of the act of sodomy on Azizan as particularized in the first charge against Sukma.

[260] There were also other subsidiary issues raised, such as the amendment to the charges, the notice of alibi and disqualification of the trial judge. I have considered the opposing contentions and I am of the view that the reasoning given by the trial judge and the concurrence by the Court of Appeal require me to add nothing more.

[261] Accordingly, overall and on the evidence adduced by the Prosecution on the charges preferred against both the appellants, namely under s 377B of the Penal Code against both the appellants and under s 109 of the Penal Code against the second appellant, I am of the opinion that the trial judge was perfectly correct to come to his conclusion thus (at p 283 [2001] 3 MLJ 193):

> Having regard to the totality of the evidence adduced so far by the prosecution and after carefully considering the submission of counsels for both the accused and the prosecution, I am satisfied that the prosecution has successfully established a case beyond a reasonable doubt against Dato' Seri Anwar and Sukma on the offence for which they are being charged. If they choose to remain silent at this stage which I hold they are perfectly entitled to do they can be convicted on the charges. As a consequence my order was that Dato' Seri Anwar and Sukma were called upon to enter their defence on the charges against them. When the three alternatives were explained to them, both accused elected to give evidence on oath.

[262] Turning now to the defence raised. Basically it touches on the issue of alibi of both the appellants including the denial on the part of the first appellant of having been at Tivoli Villa, fabrication of evidence and conspiracy. These were raised in addition to the attack on the evidence adduced by the Prosecution, specifically on the evidence of Azizan and the confession of Sukma. I have already dealt with the latter hereinabove.

[263] On the denial of being at Tivoli Villa which therefore is linked to the issue of alibi and inclusive of the sub-issues of non-completion of the apartment and purchase of bed and mattresses, I find that the trial judge had meticulously examined and considered all the evidence and circumstances adduced before coming to his conclusions. As these are findings of fact to which the Court of Appeal concurred, this court being the final appellate court should be very slow to interfere without any compelling and substantial reason to do so. And having considered the issues in the light of the overall evidence adduced and the relevant circumstances, I am not persuaded to say that there is any substantial and compelling reason for me to interfere with such finding.

[264] On the allegation of conspiracy the trial judge had also closely scrutinized the evidence adduced by the defence on the issue. As expected the trial judge considered each and every account of the witnesses called and their probabilities before coming to his finding. He also pondered on the explanation and submissions of learned counsel on the reason for Azizan to come back to see the first appellant after the alleged incident. The trial judge accepted the explanation given. It is not a case of where the trial judge only gave a cursory treatment to the materials before him. He dealt with the facts and the law involved before coming to his finding. I cannot find any fault on that approach.

[265] Overall there is no reason for me to disagree with the conclusion of the trial judge when he said this (at pp 316–317 at [2001] 3 MLJ 193):

> This brings me to the question whether the defence has raised a reasonable doubt on the prosecution case. I have carefully considered the evidence adduced by the prosecution and the defence as a whole. My conclusions are as follows:
>
> (1) it is my finding as a fact that the alibi of both the accused does not cover the whole of the period between January to March 1993 as stated in the charge. The alibi covered the period only from 4 February to 31 March 1993 and is therefore incomplete. The defence of alibi therefore fails;
>
> (2) the defence that both the accused never went to Tivoli Villa at 7.45 pm between January to March 1993 also failed based on the evidence of Azizan which I accepted as truthful and reliable;
>
> (3) the defence of conspiracy to fabricate evidence has not been substantiated by admissible and cogent evidence adduced by the defence. This defence also failed;
>
> (4) the voluntariness of Sukma's confession (P4) is affirmed;
>
> (5) the truth of P4 has been established as far as it relates to both the accused;
>
> (6) there was corroboration on the evidence of Azizan;
>
> (7) the credibility of Azizan is affirmed;
>
> (8) Sukma has not cast any doubt on the prosecution case of abetment against him. There is ample evidence adduced that he abetted Dato' Seri Anwar in committing sodomy against Azizan;
>
> (9) It is my finding that the defence evidence adduced on behalf of both the accused as a whole has not succeeded in creating any reasonable doubt on the case for the prosecution; and
>
> (10) It is also my finding that the prosecution has proved its case beyond a reasonable doubt on the charges against both the accused.

I accordingly found both Dato' Seri Anwar and Sukma guilty on the charges against them. I accordingly convicted Dato' Seri Anwar on the charge against him. I also accordingly convicted Sukma on the two charges against him.

[266] In the circumstances, and for the reasons hereinabove stated by me, I would therefore dismiss the appeals by both the appellants, against their convictions on the charges preferred against them respectively.

[267] On the issue of sentence, although no submission was made before us but for completeness, I shall touch briefly on it.

[268] The law on the issue of sentence is settled. An appellate court will not normally interfere with any sentence passed by a lower court unless it is satisfied that the sentence passed by the lower court is manifestly inadequate or excessive or illegal or otherwise not a proper sentence, having regard to all the facts disclosed or that the court has clearly erred in applying the correct principles in the assessment of the sentence passed. (See *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256)).

[269] Thus in the instant appeals, as regards the sentences imposed against the appellants, I have considered the reasons given by both the trial judge as well as the learned judges of the Court of Appeal. With respect I am not convinced that there is any ground for me to say that the courts below erred, so as to warrant this court to interfere. I agree with the learned trial judge that the offences committed by the appellants were serious and demanded appropriate punishment so as to reflect public abhorrence to such crimes.

[270] Accordingly I also dismiss these appeals against the sentences passed by the learned trial judge.

Appeals allowed. Convictions and sentences of first and second appellant set aside.

Reported by Mariette Peters-Goh